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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

VS.

PEARSON FOUNDATION, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

As in No. 90-985, *Bray v. Alexandria Women's Health Clinic*, in which the Court granted certiorari on February 25, 1991, this case concerns the availability of 42 U.S.C. § 1985(3) to remedy certain orchestrated antiabortion actions aimed at obstructing women from effectuating their decision to end a pregnancy. And, as in *Bray*, this case poses issues of whether a conspiracy focused upon women seeking abortions satisfies the class-based-animus requirement of section 1985(3). In *Bray* the defendants' activities are those that go under the name "Operation Rescue." Here the complaint alleges injury to the petitioner through the device of a fake abortion clinic, a place established to lure to it women seeking abortion services and then, their access so gained, to employ measures against them (a graphic audiovisual presentation, etc.) designed to overcome or frustrate their wills to proceed with the abortion. The petitioner in this case formulates her questions presented as follows:

1. Whether women seeking abortions can qualify as a class entitled to section 1985(3)'s protection against conspiracy motivated by invidiously discriminatory animus.

2. Whether the petitioner's allegation of the mental fact of gender-based animus as the motivation behind the respondents' abortion-obstruction scheme is resolvable against her on motion to dismiss for failure to state a claim.

LIST OF PARTIES

Parties to the proceedings below were the petitioner, Warna Irene Lewis, the plaintiff in the district court, and the respondents, Pearson Foundation, Inc., John M. Byers, Mother and Unborn Baby Care of St. Louis, d.b.a. A-A-A Pregnancy Problem Center, Rita Roberson, Richard Chrismer, Marie Becker, Mary Elizabeth Kretschmer, Susan Schlesinger, Thomas Rohan, and Elizabeth Doe (sued under a fictitious name for lack of knowledge of her true identity), defendants in the district court.*

The petitioner is an individual and hence does not make the listing required by the Court's rule 29.1 of any parent or subsidiary corporations.

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*The petitioner has received a copy of an order dated November 30, 1990, of the Honorable Mary Davies Scott, Bankruptcy Judge, United States Bankruptcy Court for the Eastern District of Arkansas, stating that in case number 90-10194, Robert J. Pearson and Kathleen J. Pearson, as debtors in that case, have been released from all dischargeable debts under chapter 7 of title 11 of the United States Code and that all creditors whose debts are discharged by the order "are enjoined from instituting, or continuing any action, or employing any process, or engaging in any act to collect, such debts as personal liabilities of the [debtors]." In compliance with that order the petitioner states her intention not to proceed in this Court against Robert J. Pearson and Kathleen Pearson, who were the only additional defendants below.

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II. The district court, in rejecting, on the respondents' motions to dismiss the complaint for failure to state a claim, the complaint's allegations of the respondents' animus toward women seeking abortions as motivating their antiabortion conspiracy and in finding the respondents' motivation to be otherwise, applied a mode of assessing a complaint's factual allegations that fundamentally oversteps a district court's function in relation to that of a jury and, as a corollary in a section-1985(3) case such as this, undermines the remedy thereby given. 16

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OPINION BELOW

The opinion of the three-judge Eighth Circuit panel, later vacated by the court en banc, is reported at 908 F.2d 318 and is reprinted in the appendix to this petition beginning at page A-13. The order of the Eighth Circuit en banc affirming the judgment of the district court by an equally divided court is reported at 917 F.2d 1077 and is reprinted in the appendix at page A-1.

The order and memorandum of the United States District Court for the Eastern District of Missouri dismissing the petitioner's action are unpublished; they appear in the appendix beginning at page A-3.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1985(3), the petitioner brought this action in the United States District Court for the Eastern District of Missouri. The district court granted the respondents' motions to dismiss the complaint for its failure to state a claim. See page A-3, *infra*.

On the petitioner's appeal, an Eighth Circuit panel first reversed the district court but the panel's opinion and judgment were vacated by the Eighth Circuit en banc, which, upon its rehearing of the case, split by a five-to-five vote and, on October 24, 1990, ordered the district court judgment affirmed by an equally divided court. See page A-1, *infra*. On January 10, 1991, the Eighth Circuit denied the petitioner's petition for rehearing made following the full court's determination. See page A-35, *infra*.**

**Following the court en banc's order of October 24, 1990, the petitioner, on November 6, 1990, filed her "[p]etition for [r]ehearing" as to the outcome thereby determined. On December 7, 1990, the court entered its order denying the petitioner's "suggestion for rehearing en banc" and denying also the "[p]etition for rehearing by the panel." App. 33. After the petitioner by letter pointed out to the Eighth Circuit clerk that she had filed neither a suggestion for rehearing en banc nor a petition for rehearing by the panel, but rather a petition for rehearing in relation to the court en banc's determination of October 24, 1990, the court, on December 17, 1990, entered its further order striking the last sentence of its December 7 order. App. 34. This deleted the reference to a denial of the "[p]etition for rehearing by the panel" but left standing that part of the December 7 order denying a "suggestion for rehearing en banc." After the petitioner by letter again informed the Eighth Circuit clerk that no filing so denominated or of such character had been made (or could have been since the appeal had already been heard by the court en banc), the court on January 10, 1991, entered its order first vacating its previous orders of December 7, 1990, and December 17, 1990, and then stating, "Appellant's *petition for rehearing* has been considered by the court and is denied." App. 35 (emphasis added). As the court of appeals ultimately

(Continued on page 3)

The jurisdiction of this Court to review the Eighth Circuit's order of October 24, 1990, rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1985(3) (1988) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States,

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*(Footnote ** continued from page 2)*

made straight of record, the petitioner's filing of November 6, 1990, was a *petition* for rehearing relative to the court en banc's determination of October 24, 1990, and not a *suggestion* for rehearing en banc. The filing is therefore one made under rule 40, and not rule 35, of the Federal Rules of Appellate Procedure. The ninety-day period for the filing of this petition for certiorari thus commenced to run from the court of appeals' January 10, 1991, denial of the petitioner's timely filed petition for rehearing. Sup.Ct.R. 13.4.

the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

STATEMENT OF THE CASE

The petitioner's complaint for damages brought under 42 U.S.C. § 1985(3) stands dismissed for failure to state a claim for relief. No evidence having been reached, the petitioner highlights her complaint rather than the "facts" of the case.

I. Allegations of the Complaint

The complaint is not subdivided into counts. It tenders a single federal claim premised on the following allegations:

The respondents posit for all of society as well as themselves a moral-religious standard holding that abortion at any stage constitutes the prohibited killing of an unborn child. Under such a banner they "together have established a mock abortion clinic whose function it is to draw girls and women to it believing that they will there be provided an abortion, but who instead are visited by staff with a lacerating psychological attack upon their abortion decision and with all manner of trickery and deceit in the effort to divert them from the exercise of this choice." Complaint ¶ 1, app. 36-37.

The respondent Pearson Foundation, Inc. (hereafter "Pearson Foundation" or "Foundation"), is an organization declaring itself dedicated to the prevention of abortion by all means commensurate with the need to save the life of the unborn—and the soul of the abortion-bound woman. In furtherance of its aims, it encourages and assists others in the formation and operation of affiliated fake abortion clinics. It does so by its offer and provision of materials, training, and consultation. One such affiliated fake clinic is a facility located in St. Louis County, Missouri, legally named Mother and Unborn Baby Care of St. Louis but advertising itself to the public as the "A-A-A Preg-

nancy Problem Center" or the "Pregnancy Problem Center" (hereafter "A-A-A").

In addition to the Pearson Foundation and A-A-A, both not-for-profit corporations, ten individuals are named defendants as participants in the section-1985(3) conspiracy. These individuals are officers, directors, or staff members of one or the other of the corporate defendants. *Id.* ¶ 4, app. 37-38.

Like other Pearson Foundation-inspired facilities, A-A-A operates in accordance with a manual distributed by the the Foundation titled *How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center*. The manual is a "blueprint and script" for the running of a fake clinic. It instructs on how to hide the fake clinic's counter purposes behind the false facade of a medical clinic genuinely offering abortions; and how ultimately to render an unsuspecting visitor a captive audience for the Foundation-produced slide show, the main weapon in its psychological arsenal. *Id.* ¶ 5, app. 38.

The petitioner, Warna Irene Lewis, in late September 1986 having decided on an abortion, turned to the Yellow Pages of the St. Louis telephone directory. Under the heading "Abortion Information and Services," she found the display ad of A-A-A offering a free pregnancy test and "PREGNANCY-ABORTION INFO." She called, was assured that she could be helped, and made an appointment. *Id.* ¶¶ 6 & 7, app. 38-39.

At A-A-A the petitioner, still laboring under her deception, on instruction produced a urine sample for pregnancy testing. A staff member attending the petitioner, identified as the defendant Doe, told the petitioner she wanted her to watch a slide show while the pregnancy test was being run. *Id.* ¶ 8, app. 39-40. The slide presentation, to which the petitioner was subjected "without any forewarning to her or awareness on her part of what was to come and fully against her desire knowingly to submit to such," featured color slides of dismembered parts of fetuses, advanced

fetuses piled in buckets, women having abortions done by means of crude-appearing instruments, and such like. *Id.* ¶ 9, app. 40.

The petitioner protested to Doe on the latter's reappearance right after the slide show ended. Doe then beseeched the petitioner to forgo the abortion. After the petitioner rejected this option, Doe expressed acceptance of the petitioner's intentions and volunteered to assist her in securing an abortion by "a respectable doctor." Pressed to obtain the abortion because nearing the end of the first trimester of her pregnancy, the petitioner accepted Doe's offer of help. Doe left and then returned to the room, telling the petitioner that an appointment had been made for her at a local medical center a couple of days hence. Doe stated, in answer to the petitioner's question, that she assumed the abortion would be performed at that time. *Id.* ¶¶ 7 & 10, app. 39, 40-41.

Upon reporting to the medical center for her "appointment," the petitioner was informed that no abortions were performed there because it was a Roman Catholic institution. *Id.* ¶ 11, app. 41. Of this Doe and the Crisis Pregnancy Center were aware when they sent the petitioner there, for the medical center had previously told Crisis Pregnancy Center to cease the practice. *Id.* ¶ 12, app. 41.

The petitioner, in the following week, was able to obtain the abortion. About a month later she received a telephone call at work from Doe, inquiring as to when the baby was due. *Id.* ¶ 13, app. 42.

All the things done to the petitioner at and through the Crisis Pregnancy Center were done pursuant to a conspiracy among all the respondents, the plan and objective of which was, "by means of guile, deceit, trickery, lying, imposition of guilt, and intense psychological disruption, to prevent as many women as possible from obtaining abortions." *Id.* ¶ 14, app. 42. The conspiracy, therefore, was "motivated by an invidiously discriminatory

animus toward a class of women each of whom, like the plaintiff . . ., has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion." *Id.*

The respondents' conspiracy, moreover, "wittingly or unwittingly, [was] aided and abetted by the refusal of the Missouri attorney general, upon the complaints and reports . . . made to him about the methods of the fake abortion clinics in general and A-A-A in particular, to invoke the broad statutory and common law remedies at his disposal (and readily employed by him in other instances certainly no more egregious than this one) to prevent these places from engaging in the deceptive advertising practices on which their success depends." *Id.* ¶ 16, app. 43. Further, the attorney general "encouraged the defendants' conspiracy by his public pronouncements that the defendants' advertising does not, in his opinion, constitute misrepresentation." *Id.*

For the emotional and mental and other injurious consequences dealt her through the respondents' conspiracy, *id.* ¶ 17, app. 43-44, the petitioner asked that they respond in actual and punitive damages.

II. Proceedings in the Courts Below

All the respondents, in groups or individually, moved to dismiss the complaint for its asserted failure to state a claim for relief. By its order of January 15, 1988, the United States District Court for the Eastern District of Missouri granted the motions. App. 3. In an unpublished memorandum filed with its order, the district court wrote that the petitioner had failed to plead herself within a class entitled to section 1985(3)'s remedy against conspiracy motivated by class-based, invidiously discriminatory animus—the fundamental test for application of the provision first so expressed in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Assuming a reach of the statute beyond protection of blacks and their supporters, though noting the question to have

been left open in both *Griffin* and the later decision in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983), the district court nevertheless found the petitioner's class identity, as it viewed it, to fall outside section 1985(3)'s bounds. In arriving at its result, the district court rejected the petitioner's definition of the targeted class as one of women seeking abortions. App. 10-11. Selecting two passages from the complaint referring to the respondents' positing or professing of a moral-religious or a religious rationale for their conduct, the district court deemed the petitioner's true class—actually a nonclass—to be one simply of persons who do not share the respondents' religious beliefs on abortion. App. 11. The district court thus conformed the present case to *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987), where section-1985(3) plaintiffs themselves had unsuccessfully defined their class in this way. Dismissing on the ground of lack of a recognizable class, the district court rejected examination of the other issues argued on the respondents' motions.

On the petitioner's appeal to the United States Court of Appeals for the Eighth Circuit, the three-judge panel first hearing the case in that court, in an opinion of July 10, 1990, reversed and remanded. One judge dissented.

The panel majority first quickly disposed of the respondents' argument that they should not be held accountable because *Roe v. Wade*, 410 U.S. 113 (1973), is wrongly decided. The majority pointed to two recent decisions in this Court, *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), and *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), recognizing the continuing viability of *Roe v. Wade*. 908 F.2d at 320, app. 17.

The majority next turned to the issue of whether an allegation of state involvement in the respondents' conspiracy was necessary to uphold the petitioner's cause resting on 42 U.S.C. § 1985(3).

They first noted the absence of any state-action requirement on the face of the provision and the recognition in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that it could, in some situations, reach wholly private conspiracies. Whether the petitioner needed to plead state action depended on the nature of the underlying constitutional right she sought to assert through section 1985(3). Distinguishing the substantive constitutional right of privacy under siege in this case from the first-amendment right involved in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983), the majority rejected the argument that state action was here a required element. Further, the majority, as "underscor[ing their] conclusion," referred to two Eighth Circuit cases—one decided before *Scott*, *supra*, and one after—holding that Congress possessed the power under section 5 of the fourteenth amendment to enforce substantive guaranties defined under that amendment as against private conspiracies. 908 F.2d at 320-22, app. 17-21.

Alternatively, the majority held that the complaint did sufficiently allege state involvement. Though they refused to find requisite state involvement in the Missouri attorney general's remedial "inaction" in the matter of the fake clinics' advertising, the majority found the allegations of the attorney general's encouragement of the respondents, by pronouncing their advertising to be free of misrepresentation, to go beyond inaction and into the area of active participation in the conspiracy. 908 F.2d at 322-23, app. 21-22.

Moreover, the majority observed that since section 1985(3) contained no independent state-action requirement and protected against no less than conspiracy to deny the "equal enjoyment of rights secured by the law to all," 908 F.2d at 323, app. 22 (quoting *Griffin*, *supra*, at 102), the section could be invoked, without any showing of state involvement, where there were in issue private rights conferred by state law. Citing to the Missouri Court of Appeals decision in *Boes v. Deschu*, 768 S.W.2d 205

(Mo. Ct. App. 1989), where, in a suit against a like pregnancy center, the court had sustained allegations of conduct "very similar to the allegations in this case," the majority held that the right under Missouri law to be free from intentional infliction of emotional distress could serve as a basis for the petitioner's section 1985(3) action. 908 F.2d at 323, app. 22-23. The panel majority thus directed the district court to explore on remand whether the petitioner could demonstrate the existence of any rights under state law in support of her claim. 908 F.2d at 323-24, app. 24. Also on this score, the majority found the complaint's allegations relative to the role of Missouri's attorney general readable so as to describe a conspiracy by him to deprive the petitioner of the evenhanded enforcement of the Missouri consumer protection statutes and other legal protections prohibiting or remedying deceptive advertising practices. 908 F.2d at 322-23, app. 21-22.

The majority then turned to the question of whether the petitioner had adequately pleaded the existence of class-based discriminatory animus, the sole issue on which the district court had disposed of the case. They pointed out, as had the district court, that both in *Griffin*, *supra*, and later in *Scott*, *supra*, this Court had expressly reserved the question whether conspiracy motivated other than by racial bias was actionable under section 1985(3). Though noting cases on both sides of the question in the federal district courts and courts of appeals, the majority adhered to the precedents in their own court recognizing section 1985(3)'s coverage of additional classes, including women. With advertence to the specific recitations of the present complaint, they distinguished the case relied on in the district court, *Roe v. Abortion Abolition Society*, *supra*, where the plaintiff class consisted of clinic personnel as well as patients and where the plaintiffs identified their class as one of persons not sharing the defendants' religious beliefs opposed to abortion. By contrast, observed the majority, the petitioner here alleged conspiracy against her solely by virtue of her membership in a class of

women seeking abortions. On this basis, the majority determined the petitioner's class to be suitably tailored for the purpose of her section-1985(3) action. 908 F.2d at 324-25, app. 24-27.

Finally, the panel majority found the petitioner's pleading to meet all other elements of the cause of action provided by section 1985(3). 908 F.2d at 325-26, app. 27-28.

The dissenting judge departed from the majority only on the issue of whether the pleading of state involvement was essential to the petitioner's section-1985(3) action. He read this Court's decision in *Scott*, *supra*, in effect to have overruled that part of the Eighth Circuit's holding in *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc), that viewed section 1985(3) as an exercise of Congress' power under section 5 of the fourteenth amendment to proscribe private conspiracies aimed at substantive rights guaranteed through that amendment. According to the dissenting judge, *Action* and a later Eighth Circuit case, one decided after *Scott*, both affirmed the existence of such power in Congress, and these holdings as to the existence of the power were not inconsistent with *Scott*. But following *Scott* section 1985(3) could no longer be seen as an exercise of such congressional power. Therefore, concluded the dissenting judge, since the substantive right allegedly infringed in this case was the petitioner's right under the fourteenth amendment to have an abortion, a right protectible only against state infringement, she could not make out her section-1985(3) claim without a showing that the state was involved in or affected by the conspiracy, which her pleading failed to do. 908 F.2d at 326-328, app. 28-32.

On the filing of the respondents made following the panel decision, the court of appeals, by its order of September 7, 1990, vacated the panel opinion and the judgment based on it and granted a rehearing before the court en banc. Following oral argument to the full court, the ten judges sitting split five-to-five

on the vote whether to affirm or reverse the district court. Thus the court, on October 24, 1990, ordered "the judgment of the district court . . . affirmed by an equally divided court." 917 F.2d 1077, app. 1. No opinions were issued in connection with this order. The petitioner thereafter filed her petition for rehearing, which the court denied by its order of January 10, 1991. App. 35.

REASONS FOR GRANTING THE WRIT

I

THIS COURT HAS GRANTED CERTIORARI IN *BRAY V. ALEXANDRIA WOMEN'S HEALTH CLINIC* PRESENTING PRIMARY ISSUES OF WHETHER, IN THE CONTEXT OF "OPERATION RESCUE" ANTIABORTION ACTIONS, CONSPIRACY DIRECTED AT WOMEN SEEKING ABORTIONS SATISFIES THE CLASS-ANIMUS REQUIREMENT OF 42 U.S.C. § 1985(3); AND THE PRESENT CASE PRESENTS SUBSTANTIALLY THE SAME ISSUES, HERE IN THE CONTEXT OF ANTIABORTION ACTIONS PURSUED THROUGH A FAKE ABORTION CLINIC.

As mentioned at the outset, this Court has granted certiorari in *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (cert. granted Feb. 25, 1991). The first two issues listed in the certiorari petition in that case are as follows:

> 1. Do 'women seeking abortions' constitute a valid class for purposes of the 'class animus' requirement of 42 U.S.C. § 1985(3)?
>
> 2. Is opposition to abortion *per se* discrimination against women for purposes of the 'class animus' requirement of 42 U.S.C. § 1985(3)?

Petition for Writ of Certiorari at i, *Bray v. Alexandria Women's Health Clinic*. Though varied in phrasing because of the different procedural routes traveled by the two cases and because of the litigants' somewhat different perspectives on the issues, the questions in the present case are in substance the same as the ones in *Bray* quoted above. In both instances, the applicability to

women seeking abortions of section 1985(3)'s protection against class-based-animus is at the heart of the matter.[1]

The petitioners in *Bray* are principals in blockading and other "Operation Rescue" actions at abortion-providing clinics. *Id.* at 3-5. As they candidly, if smugly, proclaim in their certiorari petition:

> The national controversy over the issue of human abortion has given rise to a multitude of local conflicts between opponents and providers of abortion. Opponents of abortion have employed a variety of strategies to discourage or prevent abortions.

Id. at 12. Once such strategy has been the operation of fake abortion clinics.

Though highly organized like Operation Rescue, the fake clinics differ in the respect that, for obvious reasons, their operators seek to keep the antiabortion role of these places as concealed as possible, whereas Operation Rescue stagings are accompanied by as much publicity as their organizers can stir. Yet these places, their number, and their impact have not escaped notice:

> [Fake abortion clinics] are anti-abortion counseling centers which advertise in a manner that would lead a pregnant

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[1]A third question in the *Bray* petition submits whether private actors hindering access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state. This question is not tendered in the present case because, in contrast to *Bray*, it involves one individual plaintiff suing solely on behalf of herself, who departed for the fake clinic involved from her place of work within the same state as the facility and whose complaint therefore shows no interstate travel. The last two questions listed in the *Bray* petition relate to pendent jurisdiction and an award of attorney's fees, questions not a part of the instant case.

> woman or girl to believe that they provide a full range of women's health services when, in reality, they provide only a pregnancy test, accompanied by intense anti-abortion propaganda. Women who are victimized by these centers may feel severe psychological distress[.] . . . The impact of fake abortion clinics has been staggering. Between 2,000 and 3,000 such anti-abortion counseling centers are scattered widely throughout the United States, from New York to Florida, to South Dakota, Texas and California.

Note, *Challenging Fake Abortion Clinics: Protecting Women's Privacy Interests Without Violating the First Amendment,* 15 N.Y.U. Rev. L. & Soc. Change 547, 548 (1986-87) (footnotes omitted). The tendentious name of the journal in which it appears need not detract from the reliability of this description. Similar appraisals of the extent and effect of the Pearson and other fake clinic systems are elsewhere to be found, in the general-interest press as well as legal periodicals. *See, e.g.*, Blodgett, *Abortion Clinics that Aren't,* A.B.A. J., Dec. 1, 1986, at 21; Gross, *Pregnancy Centers: Anti-Abortion Role Challenged,* N.Y. Times, Jan. 23, 1987, at B1, col. 2; Uehling, *Clinics of Deception*, Newsweek, Sept. 1, 1986, at 20; Berger, *Centers' Abortion Ads Called 'Bogus,'* N.Y. Times, July, 16, 1986, at B2, col. 4.

The deceptive practices of the fake clinics have been challenged by state attorneys general in some instances, but not extensively so, *see* Note, *Challenging Fake Abortion Clinics, supra*, at 548—and not in Missouri, as the petitioner has alleged. In sum, the problem of the fake abortion clinics, in which are rooted the questions herein of the availability of 42 U.S.C. § 1985(3) to abortion-seeking women, is a significant, unremedied, and ongoing one in terms of the number of women transgressed—oftentimes profoundly so—by this mode of organized antiabortion activity. This is so even though this mode, being insulated and of a propensity to wreak immense personal embarrassment and

humiliation, yields of its particular nature not nearly the public awareness attending other of the tactics used.

II

THE DISTRICT COURT, IN REJECTING, ON THE RESPONDENTS' MOTIONS TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM, THE COMPLAINT'S ALLEGATIONS OF THE RESPONDENTS' ANIMUS TOWARD WOMEN SEEKING ABORTIONS AS MOTIVATING THEIR ANTIABORTION CONSPIRACY AND IN FINDING THE RESPONDENTS' MOTIVATION TO BE OTHERWISE, APPLIED A MODE OF ASSESSING A COMPLAINT'S FACTUAL ALLEGATIONS THAT FUNDAMENTALLY OVERSTEPS A DISTRICT COURT'S PROPER FUNCTION IN RELATION TO THAT OF A JURY AND, AS A COROLLARY IN A SECTION-1985(3) CASE SUCH AS THIS, UNDERMINES THE REMEDY THEREBY GIVEN.

A

It is of course the procedural standing of this case that, in ten-pin effect, the judgment of the district court was reversed by the Eighth Circuit panel whose opinion and judgment were vacated by the full Eighth Circuit which affirmed the judgment of the district court on an evenly split vote. By such a chain of events the field, strictly speaking, has been swept clear of any controlling opinion, for by what appears to be the entrenched rule the final judicial disposition—the affirmance by the equally divided full Eighth Circuit—reinstates the judgment only of the district court, and neither the final Eighth Circuit vote nor the district court's reasoning or judgment stand with any precedential or other significance beyond an adjudication of the case respecting the litigants directly involved.

Where this Court divides equally it is "the settled practice . . . to enter a judgment of affirmance; but this is only the most conve-

nient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment." *Neil v. Biggers*, 409 U.S. 188, 192 (1972) (quoting *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1869)). The affirmance by an equally divided court is entitled to no precedential weight. *Neil, supra*, at 192 (citing *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960)). Like precepts guide the federal courts of appeals. *See Lambros v. Young*, 145 F.2d 341, 343 (D.C. Cir. 1944) (affirmance by an equally divided court affirms only the judgment of the court below but does not indicate approval of its findings of fact or conclusions of law). The rule mandating affirmance by an equally divided court is therefore a rule of finality and of *res judicata* effect for the particular civil litigants, but has no implications beyond. *See United States ex rel. Radich v. Criminal Court*, 459 F.2d 745, 750-51 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

Technically this means that the district court judgment in the present case exists formally detached from any reasoned conclusions. It is equally clear, however, that the basic class-animus issues raised in the *Bray* certiorari petition and in this petition were extensively considered here by both the district court and the court of appeals panel. The district court dealt only with the subject of class-animus, dismissing on this ground. It puzzled over whether this Court's decision in *Scott, supra*, affected earlier Eighth Circuit holdings applying section 1985(3) in favor of women and other nonrace classes, app. 8-9, before going on to reject the petitioner's pleaded assertion that her class identity derived from being a woman seeking an abortion. App. 9-11. The panel, on appeal, in disavowing the district court's analysis, also gave this subject thoroughgoing attention. 908 F.2d at 324-25, app. 24-27.

It is therefore submitted that the question of whether women seeking abortions can be an aggrieved class under 42 U.S.C. § 1985(3) is in this case, notwithstanding the default of any sur-

viving opinion, a question of such salience and vitality as to be appropriate for this Court's plenary consideration. Were the absence of a viable lower-court opinion through an even vote by the circuit en banc, *ipso facto*, to preclude this Court's review, it would seem that some of the cases most in need of this Court's attention would, ironically, suffer automatic disqualification.

B

The second question presented in both the *Bray* certiorari petition and this one pertains to the existence of the conspirators' animus-in-fact toward women seeking abortions. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), this Court held that in order to make out a case under 42 U.S.C. § 1985(3) "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102 (footnote omitted); *see also United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 834 (1983).[2] Once past the question of whether women seeking abortions can qualify for the class protection of section 1985(3), there is faced the second question, closely related to the first, of what degree of pleading or proof suffices on the issue of whether the respondents conspired against these women because of requisite animus toward them.

The second question in *Bray* asks whether opposition to abortion is *per se* discrimination against women under the statute. Understanding that by the *Bray* petitioners' own confession "opposition" means blockading women from receiving abortion services, the right that they and the present respondents by means equally extreme seek to deny to women is the right whose dimensions this Court has elaborated as follows:

[2]*Griffin* left nothing to guesswork regarding the centrality of the animus element to the section-1985(3) action: "The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." 403 U.S. at 102 n.10.

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe* —whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (citations omitted).

One strains to conceive how a conspiracy organized solely to deprive women of a right so understood, carried out in injurious fashion by acts receiving no first-amendment or other legal protection, could ever be said not *per se* to speak animus toward women.[3] If, however, it would be the Court's view that a conspiracy with such an aim does not *per se* constitute gender

[3]An indication of Congress' present view that discrimination relative to abortion is *per se* sex discrimination may be found in the legislative history of the Pregnancy Discrimination Act, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1988). Passed by Congress in 1978, the Act amended title VII of the 1964 Civil Rights Act by explicitly extending its prohibition against sex discrimination in employment to discrimination on the basis of "pregnancy, childbirth, or related medical conditions." As to the scope of this added provision, the House Conference Report states that "its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion." H.R. Conf. Rep. No. 1786, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. Code Cong. & Ad. News 4765, 4766. The EEOC guidelines issued in connection with the Act are to the same effect. *See* 29 C.F.R. pt. 1604 app., intro. & question 34 & answer thereto (1990).

animus, then this petitioner believes it important for the Court not to accept the converse of this proposition—that such a conspiracy, as a matter of law, does not reveal requisite animus toward women—but rather to give guidance on the pleading and proof requirements on this issue and on the function as between court and jury in its determination.[4]

If abortion resistance of the kind described in the present complaint does not *per se* reflect female animus, then there must be deeper inquiry as to the respondents' motivation in seeking to block women from receiving abortions. The inquiry, then, focuses on a mental, or state-of-mind, fact, an issue singularly inappropriate for resolution against a plaintiff as a matter of law. Yet in this case, the district court chose to ignore the petitioner's express allegation that the respondents' conspiracy, executed through their fake abortion clinic, was "motivated by an invidiously discriminatory animus toward a class of women each of whom, like the plaintiff herein, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion." Complaint ¶ 14, app. 42. The district court laid the respondents' motivation to their religious beliefs, and, since the petitioner, for the purpose of section-1985(3) standing, was simply someone who did not share those beliefs, she was out of luck under the law on which she relied.

The district court's treatment undermines fundamental concepts concerning the evaluation of complaints on a motion to dismiss for failure to state a claim; it also unduly expands the court's function in a manner that encroaches upon the petitioner's right to a jury determination of questions of fact. The rules of pleading call for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a).

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[4]The petitioner demanded a jury trial on the face of her complaint. *See* app. 36.

Conditions of mind, as motivation inarguably is, "may be averred generally." *Id.* 9(b). For the purpose of a motion to dismiss, the material allegations of the complaint are to be taken as admitted. *See, e.g., Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-75 (1965). The complaint is not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted).

The petitioner has argued that a conspiracy to prevent abortion is *per se* clearly one of animus toward women. If, however, any deeper evidence of antagonism toward women needs to be shown to satisfy the animus element, then the way should have been open to the petitioner under her complaint, and under pleading standards properly applied, to prove that the respondents' conspiracy was antiwomen in the irreducibly invidious sense that at bottom it aimed to contain women within traditionally prescribed family roles.

Such evidence resides, for example, in the Pearson Foundation's manual, *How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center*, written by Robert J. Pearson for distribution to the Foundation's affiliated fake clinics. In the very first paragraph of the manual's preface it is declared, "There has never been such a holocaust perpetrated against motherhood and the most innocent of all of God's creations, the unborn child." Robert J. Pearson, *How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center* 1 (undated). The preface also commends to the facility's volunteers a daily prayer "for the family, motherhood and unborn children." It begins, "St. Joseph and Mary, whose protection is so great before the throne of God, please petition our Father in Heaven to protect families, motherhood and their

unborn children from abortion. . . ." *Id.* at 2.[5] It is not the petitioner's purpose, in quoting the respondents' prayer, to denigrate any group's form of worship, but in degree to which she accords respect to religion's genuine expression, she denounces what she perceives here—all too closely—to be its pernicious misuse.

In summary on this point, this case includes the important question of whether the district court contravened the standard canons of deference in making the factual determination, on the motion to dismiss, that the respondents' motivation was other than that of gender animus as pleaded by the petitioner on her claim under 42 U.S.C. § 1985(3), a question that also addresses a litigant's right to a jury trial on such a claim and, as a practical matter, the utility of this provision of law.

[5] These passages from the Pearson manual are not pleaded in the complaint, nor are they otherwise a part of the record in this case. But because the test for the sufficiency of the statement of a claim for relief under *Conley v. Gibson*, *supra*, is essentially whether the complaint will admit of any conceivable proof in support of a claim, it is felt that these references are not inappropriate.

CONCLUSION

For these various reasons, the petition for certiorari should be granted; and, as the Court deems appropriate, this case should be set for argument as a companion case to *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (cert. granted Feb. 25, 1991), involving substantially the same questions. Alternatively, the petitioner requests that the Court postpone consideration of this petition until it decides *Bray* and then follow with an appropriate order in this case in accordance with its decision in that one.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1293

Warna Irene Lewis,
Appellant,

v.

Pearson Foundation, Inc.,
Robert J. Pearson,
Kathleen Pearson, John M. Byers, Mother and Unborn Baby
Care of St. Louis, d/b/a A-A-A Pregnancy Problem Center,
Rita Roberson, Richard Chrismer, Marie Becker,
Mary Elizabeth Kretschmer, Susan Schlesinger,
Thomas Rohan, and Elizabeth Doe, a fictitious name,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

(PUBLISHED)

ORDER

(Filed: October 24, 1990)

Before LAY, Chief Judge, McMILLIAN, Circuit Judge, ROSS, Senior Judge, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, En Banc.

This case has been reheard en banc, and the judgment of the district court is affirmed by an equally divided court. Judges Arnold, Bowman, Wollman, Magill and Beam vote to affirm, and Chief Judge Lay, Senior Judge Ross, and Judges McMillian, Gibson and Fagg vote to reverse.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-894 C (2)

WARNA IRENE LEWIS,
Plaintiff,

v.

PEARSON FOUNDATION, INC., ROBERT J. PEARSON, KATHLEEN PEARSON, JOHN M. BYERS, MOTHER & UNBORN CARE OF ST. LOUIS, d/b/a A-A-A Pregnancy Problem Center, RITA ROBERSON, RICHARD CHRISMER, MARIE BECKER, MARY ELIZABETH KRETSCHMER, SUSAN SCHLESINGER, THOMAS ROHAN, and ELIZABETH DOE, a fictitious name,
Defendants.

ORDER

(Filed: January 15, 1988)

In accordance with the memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED that defendants' motions to dismiss are GRANTED and plaintiff's claim for relief is DISMISSED without prejudice.

Dated this 15th day of January, 1988.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-894 C (2)

WARNA IRENE LEWIS,
Plaintiff,

v.

PEARSON FOUNDATION, INC., ROBERT J. PEARSON, KATHLEEN PEARSON, JOHN M. BYERS, MOTHER & UNBORN CARE OF ST. LOUIS, d/b/a A-A-A Pregnancy Problem Center, RITA ROBERSON, RICHARD CHRISMER, MARIE BECKER, MARY ELIZABETH KRETSCHMER, SUSAN SCHLESINGER, THOMAS ROHAN, and ELIZABETH DOE, a fictitious name,
Defendants.

MEMORANDUM

(Filed: January 15, 1988)

This matter is before the Court on the separate motions to dismiss by defendants John M. Byers, Robert J. Pearson, Kathleen Pearson, and Pearson Foundation, by defendant Richard Chrismer, and by defendants Mother & Unborn Baby Care of St. Louis d/b/a A-A-A Pregnancy Problem Center, Rita Roberson, Marie Becker, Mary Elizabeth Kretschmer, Susan Schlesinger, and Thomas Rohan (hereinafter defendants). Plaintiff has opposed the motions and reply briefs have been filed.

Plaintiff brings her complaint under 42 U.S.C. § 1985(3). Plaintiff alleges that on September 29, 1986, she contacted defendant Mother & Unborn Baby Care of St. Louis d/b/a A-A-A Pregnancy Problem Center (hereinafter A-A-A) pursuant to an advertisement in the 1985-86 Southwestern Bell Yellow Pages

under the heading "Abortion Information and Services" and explained that she was seeking an abortion. The party answering the phone indicated "they would help the plaintiff all they could," and invited plaintiff to come in to take the free pregnancy test A-A-A offered. Plaintiff scheduled an appointment for October 1, 1986. When she arrived for her appointment, she was directed to produce a urine sample for the pregnancy test and then taken by defendant Doe to a room in the facility where Doe turned on a slide show before excusing herself from the room. The slide presentation featured a series of depictions of what was said to be part of the abortion process including color slides of dismembered parts of fetuses, women having abortions by means of crude-appearing instruments, intermittent family scenes, and a discussion of medical facts concerning abortions. Plaintiff further alleges that after viewing the presentation, she confronted Doe with her feelings of anger, anxiety and distress, and insisted she still wanted an abortion after rejecting Doe's suggestion that plaintiff rely on religious faith. Doe offered to make arrangement for the abortion with a respectable doctor, and upon plaintiff's acceptance of the offer, Doe left the room and returned with a note showing an appointment with a doctor at St. John's Mercy Medical Center on October 3, 1986. On October 3, 1986, plaintiff arrived for her appointment only to discover that the hospital was a Roman Catholic institution and did not perform abortions. Plaintiff obtained an abortion one week later. On November 11, 1986, Doe called to inquire when the baby was due and to see if everything was alright. Plaintiff alleges that the defendants conspired together to deprive her of the equal protection of the laws and of her equal privileges and immunities under the laws by denying to her "constitutionally granted rights of privacy, autonomy, personhood, and liberty in exercising a choice as to the continuation or discontinuation of a pregnancy." Plaintiff further claims that the conspiracy was "motivated by an invidiously discriminatory animus toward a class of women each of whom, like the plaintiff herein, has made the decision in

answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion." Plaintiff asserts that she has been injured in that she suffers, and will continue to suffer in the future, mental distress, torment, anxiety, anguish, morbid recall, sadness, embarrassment, humiliation, and anger.

Although three motions to dismiss for failure to state a claim upon which relief can be granted have been filed, the defendants raise the same issues in each motion and therefore the Court will address the matter raised collectively. The primary issues raised by defendants are: (1) plaintiff brings her claim against private actors and § 1985(3) requires state action to assert privacy and liberty claims found in the fourteenth amendment; (2) the complaint does not specifically allege conspiracy as to each defendant and as to the time, place and overt acts; and (3) plaintiff's asserted class is not such a class as intended to be protected from invidiously discriminatory animus by § 1985(3).

Title 42, United States Code Section 1985 provides in part:

> (3) If two are more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one of more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The Supreme Court has construed 1985(3) to require allegation and proof of four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Brotherhood of Carpenters & Joiners of American, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 828-29 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

In *Griffin v. Breckenridge*, the Supreme Court reversed an earlier interpretation of 1985(3) set out in *Collins v. Hardyman*, 341 U.S. 651 (1951), which had required proof of state action in the conspiracy in order to recover under the statute. Although expanding the judicial scope of § 1985(3) to include, in some instances, purely private conspiracies, the *Griffin* Court also espoused a narrowing interpretation of the legislative history of the statute to require a class-based, invidiously discriminatory motivation behind the conspirators' action. *Griffin*, 403 U.S. at 102-03; *Scott*, 463 U.S. at 834-35. The Court declared:

> That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more persons within a State." [Cong. Globe, 42d Cong., 1st Sess., 485 1871).] The constitutional shoals that would lie in the path of interpreting 1985(3) as a general federal tort law can be avoided by

> giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means, that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin, 403 U.S. at 101-02.

In applying this narrow interpretation of § 1985(3), the Supreme Court has stated that "it is a close question whether 1985(3) was intended to reach any class-based animus other than the animus against Negroes and those who championed their cause, most notably Republicans." *Scott*, 463 U.S. at 836. Nevertheless, in *Scott*, as in *Griffin*, the Court withheld judgment as to whether the statute extends beyond "any class-based animus other than the animus against Negroes" and their supporters. In *Griffin*, the conspiracy was held to have been motivated by class-based animus against blacks and their supporters. In *Scott*, the Court held that a claim by non-union workers and their employers alleging that certain unions and their members had conspired to deprive the plaintiffs of their first amendment right not to associate with a union did not fall within the purview of 1985(3) because the statute does not reach conspiracies motivated by economic or commercial animus. *Scott*, 463 U.S. at 838.

The Eighth Circuit Court of Appeals has conferred § 1985(3) protection in at least three cases which did not involve class-based animus against blacks and their supporters since the *Griffin* decision in 1971. *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978) (Indian women alleging conspiracy on the basis of race and sex); *Means v. Wilson*, 522 F.2d 833, 849 (8th Cir.

1975), *cert. denied,* 424 U.S. 958 (1976) (members of a political faction); and *Action v. Gannon,* 450 F.2d 1227, 1232 (8th Cir. 1971) (*en banc*) (members of religious organization). Although the Eighth Circuit has not considered the issue in light of the *Scott* decision, several post-*Scott* opinions in other circuits have held or implied that § 1985(3) does not apply beyond blacks and their civil rights supporters. *Gibson v. United States,* 781 F.2d 1334, 1341 (9th Cir. 1986); *Harrison v. Koat Food Management, Inc.,* 766 F.2d 155, 157, 160-63 (4th Cir. 1985); *Wilhelm v. Continental Title Co.,* 720 F.2d 1173, 1175-77 (10th Cir. 1983), *cert. denied,* 465 U.S. 1103 (1984). The holding in *Scott,* however, concerned economic and commercial animus, neither of which was the basis of the holdings in *Conroy, Means,* or *Action.* Because the Supreme Court refrained from ruling beyond the facts of the case before it, this Court can only view the discussion of the Supreme Court as suggesting that the statute derived from the legislative history should be considered in determining whether a conspiracy is motivated by class-based animus.

Plaintiff asserts that the conspiracy alleged in the complaint was motivated by an invidiously discriminatory animus toward a class of women each of whom, like plaintiff, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion. This asserted class-based animus is similar, in many respects to the Fifth Circuit case, *Roe v. Abortion Abolition Society,* 811 F.2d 931 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 145 (1987), in which the plaintiffs were two anonymous patients, two doctors who provide abortions, a clinic providing abortion services, members of the clinic staff, and an organization that provides escort services to the clinic, and in which the class was described as "persons who do not share defendants' religious beliefs about abortion." The plaintiffs alleged in *Roe* that "defendants had entered into a religiously motivated conspiracy to deny plaintiffs their rights of education, freedom of choice, privacy, and travel." *Roe,* 811 F.2d at 932.

In considering whether the described class was a class protected by § 1985(3), the Fifth Circuit relied upon *Griffin* and *Scott* in concluding that the protected class most be "defined by the characteristics of those at whom the conspiracy is aimed, not by the beliefs of the conspirators." *Roe v. Abortion Abolition Society*, 811 F.2d at 935. Determining that the class as defined by the plaintiffs was not protected under § 1985(3), the court reasoned:

> The class is turned on its head, however, if a class is defined as all of those who are not of the same class as the conspirators, for example, all those who do not believe in a specific religious faith or political party—or all those who do not have a religiously based opposition to abortion. Logic may define as two separate classes "we"— all of those who share a certain belief—and "they—all those who do not hold that tenet—, but § 1985(3) is aimed at an animus against those who have the despised trait. In this case, the plaintiffs do not limit the defendant class to persons who are members of a particular religious denomination but describe them only by their adherence to a specific belief that transcends denominational religious lines. Correspondingly, the plaintiffs define themselves only as "persons who do not share defendants' religious beliefs about abortion," which is no more a common trait or characteristic than would be a belief in using seat belts or in an ever-expanding universe.

811 F.2d at 935 (footnote omitted.)

The Court agrees with the reasoning of the Fifth Circuit and finds it applicable to the instant case. Although plaintiff has attempted to distinguish *Roe* by arguing that her characterization of the class is limited to women seeking abortions, whereas in *Roe*, the plaintiffs included all those person who do not share the defendants' religious beliefs about abortion, the two groups are

the same. The victims are persons exercising their right to an abortion or to provide abortions. Plaintiff couches her complaint in terms of the "moral-religious" beliefs of the defendants. Paragraph 1 of the plaintiff's complaint states:

> 1. Positing a moral-religious standard for all of society as well as themselves that, counter to positive law, views abortion at any post-fertilization stage as the prohibited killing of an unborn child, and deeming straightforward discourse and proselytizing inadequate to the task to which they have set themselves of steering pregnant women away from the choice of abortion, the defendants together have established a mock abortion clinic whose function it is to draw girls and women to it believing that they will there be provided an abortion, but who instead are visited by staff with a lacerating psychological attack upon their abortion decision and with all manner of trickery and deceit in the effort to divert them from the exercise of this choice. The plaintiff, Warna Irene Lewis, sue on account of her ordeal in connection with such place.

In paragraph 15 of the complaint, plaintiff characterizes the conspirators' acts as willful, wanton, and malicious, "all as intensified by the fervor special and unique to those self-martyred to a boundless cause of the salvation of others, as these defendants professedly were." Thus, the motivation of the defendants in both cases is likewise the same: a moral-religious belief against abortion. The class does not exist independently of defendants' actions, nor is there a common characteristic distinguishing the class from the rest of the population. The Court finds the actions of defendants do not support the class-based, invidiously discriminatory animus that § 1985(3) was intended to protect. Therefore the Court holds that plaintiff fails to state a claim under § 1985(3) upon which relief can be granted. Because the Court's holding requires dismissal of the complaint, the other issues raised in the motions will not be discussed.

Dated this 15th day of January, 1988.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1293

Warna Irene Lewis,
Appellant,

v.

Pearson Foundation, Inc., Robert J. Pearson,
Kathleen Pearson, John M. Byers,
Mother and Unborn Baby Care of St. Louis, d/b/a
A-A-A Pregnancy Problem Center, Rita Roberson,
Richard Chrismer, Marie Becker, Mary Elizabeth Kretschmer,
Susan Schlesinger, Thomas Rohan,
and Elizabeth Doe, a fictitious name,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 22, 1988
Filed: July 10, 1990

Before JOHN R. GIBSON, Circuit Judge, and FLOYD R. GIBSON and ROSS, Senior Circuit Judges.

JOHN R. GIBSON, Circuit Judge

Warna Lewis, pregnant and desiring an abortion, looked in the Yellow Pages directory under "Abortion Information and Services" and found an advertisement for the "AAA Pregnancy Problem Center" in St. Louis, Missouri. After Lewis discovered that the Center was a mock abortion clinic, run by persons opposed to abortion, she brought this action under 42 U.S.C. § 1985(3) (1982). Lewis alleges that she was injured by a private conspiracy in which the staff of the Center visited a "lacerating

psychological attack" upon her in an attempt to prevent her and other like her from carrying out the decision to have an abortion. On defendants' motion to dismiss, the district court held that while section 1985(3) supports actions against private conspiracies, Lewis had not sufficiently alleged that the defendants possessed the class-based, invidiously discriminatory animus required by section 1985(3). On appeal, Lewis contends that she, as a member of a class of pregnant women desiring an abortion, is entitled to assert a claim under the statute. Because we conclude that Lewis has properly asserted a claim under section 1985(30, we reverse and remand for further proceedings.

Lewis' complaint alleges that on September 29, 1986, she contacted the Pregnancy Problem Center after reading its advertisement in the Southwestern Bell Yellow Pages directory under the heading "Abortion Information and Services." Lewis was late in her first trimester of pregnancy and wanted an abortion. In reply to Lewis' telephone query, a staff member at the Center stated that they would "help her all they could," and invited Lewis to come in to take a free pregnancy test. Lewis scheduled an appointment for October 1, 1986.

When Lewis arrived for her appointment, she was directed to produce a urine sample for the pregnancy test. Lewis was then ushered into a room where an anonymous staff member, designated "Elizabeth Doe" in Lewis' complaint, activated a slide presentation before excusing herself. The color slides depicted scenes which were said to illustrate the abortion process. These included pictures of dismembered fetuses and abortions being performed by means of crude-appearing instruments. The slide show also contained intermittent family scenes.

Lewis alleges that after viewing this presentation, she confronted Doe with her feelings of anger, anxiety, and distress. After Doe suggested that Lewis rely on religious faith, Lewis insisted that she still wanted an abortion. Doe finally offered to

arrange an abortion with "a respectable doctor." Upon Lewis' acceptance of the offer, Doe left the room and then returned with a note indicating that Lewis had an appointment on October 3 with a doctor at St. John's Mercy Medical Center in St. Louis.

When Lewis arrived at the hospital on October 3, she discovered that it was a Roman Catholic institution and that its doctors did not perform abortions. She obtained an abortion elsewhere one week later. Roughly a month thereafter, on November 11, Doe telephoned Lewis, stating that she had called to find out when the baby was due and to check whether "everything was alright" with Lewis. Lewis asserts that this call upset her greatly, as did the harassment she experienced at the hands of the Pregnancy Problem Center.

Lewis proceeded to sue the Pearson Foundation, Inc., which organized and ran the Pregnancy Problem Center, and several other defendants involved in the operation of the clinic, including staff member Doe. Lewis alleges that they conspired to deprive her of the equal protection of the law through denial of her "constitutionally granted rights of privacy, autonomy, personhood, and liberty in exercising a choice as to the continuation or discontinuation of her pregnancy." Lewis further claims that the conspiracy was "motivated by an invidiously discriminatory animus toward a class of women each of whom, like [Lewis] herein, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by lawful abortion." Lewis asserts that she has been injured in suffering mental distress, torment, anguish, morbid recall, sadness, embarrassment, humiliation, and anger. She seeks actual damages of $150,000 and punitive damages of up to $10 million.

Lewis also alleges that despite receiving complaints about the methods of fake abortion clinics, and specifically those of the Pregnancy Problem Center, the Missouri Attorney General encouraged appellees; alleged conspiracy by publicly announcing

that their advertising did not constitute misrepresentation. Lewis alleges that the Attorney General aided the conspiracy by refusing to invoke broad state statutory and common law remedies available to prevent the use of deceptive advertising practices, and that he did this either because of "his personal concurrence" with the acts of the Pregnancy Problem Center and other "mock abortion clinics," or because of "his desire not to displease any element of his pro-life constituency."

Various defendants filed motions to dismiss the complaint for failure to state a claim. They argued that while Lewis had asserted her action against private persons, 42 U.S.C. § 1985(3) requires that a plaintiff allege state action in order to assert fourteenth amendment claims for violations of rights to liberty and privacy. Granting these motions to dismiss, the district court relied in particular on *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987), which rejected a claim under section 1985(3) charging defendants with entering into a religiously motivated conspiracy to deny plaintiffs' rights of education, freedom of choice, privacy, and travel. *Id.* at 936. The district court concluded that because Lewis alleged only that defendants acted out of moral-religious beliefs similar to those supposedly held by the defendants in *Abortion Abolition Society*, her complaint failed to establish the class-based discriminatory animus against which section 1985(3) was intended to protect. The court also held that Lewis' plaintiff class, composed of women desiring abortions, did not possess a unifying common characteristic distinguishing it from the remainder of the population.

On appeal, Lewis argues that her complaint, alleging conspiracy against her as a woman for the purpose of denying her and other women their right under the fourteenth amendment to choose to have an abortion, states a valid claim for relief under 42 U.S.C. 1985(3). The Pearson Foundation and other defendants appeal, urging, among other things, that *Roe v. Wade* is wrongly decided.

I.

We first treat appellees' argument that *Roe v. Wade*, 410 U.S. 113 (1973), and the case law developed under it, are wrongly decided. Since the case before us was argued, the Supreme Court has decided two cases which have recognized the continuing viability of *Roe v. Wade*. In *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), Chief Justice Rehnquist stated that the case afforded "no occasion to revisit the holding of *Roe*," *id.* at 3058, despite the urging of Justice Scalia, in a separate concurrence, to overrule *Roe*, *id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment). *See also Hodgson v. Minnesota*, Nos. 88-1225 & 88-1309 (U.S. June 25, 1990) (1990 WL 84063). Thus, *Roe v. Wade* both controls our decision and establishes the fundamental rights upon which Lewis' claim is based.

II.

Appellees argue that Lewis must allege state action in order to assert her claim under 42 U.S.C. § 1985(3).[1] In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that section 1985(3), on its fact, omits any requirement of state action and that the statute could, in some situations, reach wholly

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[1] 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire . . ., for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . .[and] in [such] case of conspiracy . . ., if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

private conspiracies. *Id.* at 97, 101. Since *Griffin,* the Court has significantly refined the scope of the cause of action established by 42 U.S.C. § 1985(3) by stating that:

> § 1985(3) . . . "provides no substantive rights itself" to the class conspired against. *Great American Federal Savings & Loan Assn. v. Novotny,* 442 U.S. 366, 372 (1979). The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment. Because that Amendment restrains only official conduct, to make out their § 1985(3) case, it was necessary for respondents to prove that the State was somehow involved in or affected by the conspiracy.

United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 833 (1983). To determine whether Lewis must plead state action in order to prosecute her claim under section 1985(3), therefore, we must look not to the statute itself but rather to the nature of the underlying constitutional right which she seeks to assert through the statute. In *Griffin,* for example, the rights enforced were derived from the thirteenth amendment and the constitutional right of interstate travel, which are assertable against private interference. 403 U.S. at 104-06. In the instant action the right asserted by Lewis finds its source not in the first amendment, as was the case in *Scott,* but instead in the rights of privacy recognized by *Roe v. Wade,* 410 U.S. 113 (1973). In *Harris v. McRae,* 448 U.S. 297 (1980), the Supreme Court characterized *Roe v. Wade* thus:

> The constitutional underpinning of *Wade* was a recognition that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life. This implicit constitutional liberty, the

> Court in *Wade* held, includes the freedom of a woman to decide whether to terminate a pregnancy.

Id. at 312 (footnote omitted); *see also City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 420 n.1., 426-27 (1983); *Whalen v. Roe,* 429 U.S. 589, 598-99 n.23 (1977); *Roe v. Wade,* 410 U.S. at 152-53. We have similarly characterized the right established by *Roe v. Wade* as "the constitutional freedom of a woman to decide whether to terminate her pregnancy." *Nyberg v. City of Virginia,* 667 F.2d 754, 756 (8th Cir. 1982), *cert. denied,* 462 U.S. 1125 (1983).

While *Scott* makes clear that section 1985(3) creates no substantive rights,[2] *Roe v. Wade* establishes certain fundamental rights which have been proclaimed with great force by the Supreme Court:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision — with the guidance of her physician and within the limits specified in *Roe* — whether to end her pregnancy. A woman's right to make that choice

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[2] Although *Scott* discussed state action in section 1985(3) cases at length, the Court finally concluded that it would neither remand to the court of appeals nor decide itself whether there was a conspiracy to deprive the plaintiffs of rights, privileges or immunities under state law, or those protected from private action by the federal Constitution or statutory law. Instead, the Court moved on to the dispositive ground that there was no racial or otherwise class-based, invidiously discriminatory animus behind the conspirators' actions. 463 U.S. at 833-39. The ultimate conclusion of *Scott* was that section 1985(3) could not be construed to reach conspiracies motivated by economic or commercial animus. Commentators have observed that its discussion of state action is dictum. *See* Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3),* 64 Tex. L. Rev. 527, 561 (1985); Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 Mich L. Rev. 88, 91 & n.25 (1985).

> freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh v. American College of Obstet. & Gyn, 476 U.S. 747, 772 (1986) (citations omitted). It is these rights which are incorporated under *Scott* into section 1985(3), and invoked by Lewis in her suit against the Pearson Foundation and associated parties. Appellees cite no Supreme Court or appellate cases limiting these rights to protect against only official conduct, and we decline to place any such limitation on them here.[3]

We further recognize that his court in *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971) (en banc), clearly held that first amendment rights of freedom of assembly and worship are protected not only against state action but also against private action. *Id.* at 1235. We relied heavily on the view expressed by six Justices in *United States v. Guest,* 383 U.S. 745 (1966), that Congress has the power under section 5 of the fourteenth amendment to enforce the rights guaranteed by that amendment against private conspiracies. *Action,* 450 F.2d at 1235. While the

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[3] *But see Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 681 F.Supp. 688, 691 (D. Or. 1988):

> The federal constitutional right to choose abortion is derived directly from the right of personal privacy and is rooted in the First, Fourth, Fifth, Ninth and Fourteenth Amendments. *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). This right to personal privacy is founded upon the Fourteenth Amendment's concept of personal liberty and its restriction upon state action. *Id.* at 153, 93 S.Ct. at 726-27. The recognition of a constitutional right to privacy guarantees to women the right to make certain fundamental intimate choices without governmental interference. *See Thorne v. City of El Segundo,* 802 F.2d 1131, 1138 (9th Cir. 1986). It does not, however, protect that right from private interference. *Chico Feminist Women's Health Center v. Butte Glenn Medical Soc'y,* 557 F.Supp. 1190, 1197 (E.D. Cal. 1983).

question arises as to whether this holding of *Action* survives *Scott*, this court in *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir.), *cert. denied*, 469 U.S. 838 (1984), after analyzing *Scott*, concluded that "*Scott* left untouched this court's determination that Congress could reach purely private action under the fourteenth amendment." *Id.* at 1097 (emphasis removed). *Bledsoe* concluded that *Action* remain viable authority and underscores our conclusion that official conduct is not required in this case. Finally, we observe that *Roe v. Wade* finds support for the existence of personal privacy interests and freedom of personal choice in marriage and family life in the first, fourth, fifth and ninth amendments, as well as in the fourteenth. By their nature, these interests would be meaningless were they to be protected only from interference by the state. We therefore hold that 42 U.S.C. § 1985(3) does not contain a state action requirement where, as here, a plaintiff's claim finds it course in the right announced in *Roe. v. Wade*.

Alternatively, Lewis' section 1985(3) claim is supported by her allegations that the Missouri Attorney General participated in the conspiracy. She alleges that the state Attorney General refused to employ the state statutory and common law remedies at his disposal to prevent deceptive advertising practices used by the Pregnancy Problem Center. Moreover, she alleges that the Attorney General actively encouraged appellees' conspiracy by pronouncing that the Center's advertising does not constitute misrepresentation. She alleges that he took these action solely because of "the highly charged controversy surrounding legalized abortion" and because he either personally concurs with the Center's activities or desires "not to displease his pro-life constituency."

In order to actionable under 42 U.S.C. § 1985(3), a conspiracy must "aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Scott*, 463 U.S. at 834-35 (quoting *Griffin*, 403 U.S. at 102). *Scott* specifically recognizes that such

rights can arise from state law. *Id.* at 833. Lewis' complaint can be read to describe a conspiracy by the Attorney General to deprive Lewis of the even-handed enforcement of the Missouri consumer protection laws, *see* Mo. Rev. Stat. §§ 407.010-.130 (1986), and other legal protections prohibiting or remedying deceptive advertising practices.

While we initially observe that any failure to prosecute by the Attorney General does not fulfill a requirement of "state action" under section 1985(3), *cf. Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 164[66 (1978) (holding that, under 42 U.S. C. § 1985, a state's mere acquiescence in private action does not convert action into that of the state), Lewis has alleged more than mere inaction by the Attorney General. As stated above, the complaint alleges that the Attorney General actively encouraged and participated in the conspiracy. We therefore conclude that Lewis' complaint adequately sets forth a conspiracy including state involvement to deprive her of the equal protection of state law. On this basis her complaint is sufficient to withstand a motion to dismiss.

We also observe that Lewis' complaint may be sufficient to withstand a motion to dismiss on the theory that the appellees have conspired to deny her "equal enjoyment of rights secured by the law to all." *Griffin*, 403 U.S. at 102. Since section 1985(3) contains no independent state action requirement, it is possible that, if the rights at issue give rise to a private right of action under state law, state involvement is not required under section 1985(3). *See Griffin*, 403 U.S. at 101-02. The rights involved could arise from applicable state. Recently the Missouri Court of Appeals held that a plaintiff had sufficiently stated a claim against the executive director of a pregnancy center for intentional infliction of emotional distress based upon "outrageous abortion counseling." *Boes v. Deschu*, 768 S.W.2d 205, 208-09 (Mo. Ct. App. 1989). The conduct alleged in *Boes* was very similar to the allegations in this case. Both involve women discouraged by the

defendants from seeking an abortion. The right under state law to be free from such intentional infliction of emotional distress can be the basis for an action under section 1985(3).

We find particularly insightful Professor Ken Gormley's article entitled *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 Tex. L. Rev. 527 (1985), which explores the history of the Ku Klux Klan act of 1871, the forerunner of section 1985(3), and its principal concern with reaching the actions of private conspiracies to strip members of a protected class of the equal protection of the laws. *Id.* at 569. As Professor Gormley points out:

> [S]ection 1985(3) — unlike section 1983 — does not require the deprivation of some constitutional or federally protected right. It speaks only of the deprivation of the equal protection of the laws. Thus, the rights at stake in section 1985(3) cases need not be the more familiar first or fourteenth amendment guarantees, or any other right found in the United States Constitution. Instead, the right at stake will normally be the equal protection of *state* laws—trespass laws, contract laws, property laws, and tort laws. These sorts of rights have a life all their own, with or without state action. Properly framing a complaint in this fashion prevents the obvious *faux pas* committed by the litigants in *Scott*—namely, drawing up a complaint that rests on rights which do not even exist. Properly framed, a complaint alleging a conspiracy by private individuals to strip a member of some traditionally disadvantaged class of the equal protection of the laws states a valid claim under section 1985(3). In a world where state action and private conduct often intersect, Congress is empowered to reach such discriminatory conduct to assure that "equal protection" is not just a phrase in the back of the Constitution, but something which all groups in America can actually enjoy.

Id. at 587 (emphasis in original).

On remand, the district court should explore whether Lewis is able to demonstrate that any state law establishes rights that support her claims. At this point in the litigation, however, we cannot say that there is not a viable cause of action stated under 42 U.S.C. § 1985(3) as interpreted in *Griffin* and *Scott*.

III.

We next turn to the question of whether Lewis has adequately pleaded the existence of class-based discriminatory animus. *See Griffin*, 403 U.S. at 102. In *Griffin*, the Supreme Court expressly reserved the question of whether a conspiracy motivated by invidiously discriminatory intent other than racial bias is actionable under section 1985(3). *Id.* at 102 n.9. Although in *Scott* the Supreme Court held that economic and commercial animus fails to satisfy the motivation requirement of section 1985(3), the Court again did not restrict the protections of section 1985(3) to only victims of racism. *See Scott*, 463 U.S. at 835. In her complaint, Lewis alleges that she has suffered discrimination against a class composed of "women each of whom, like [Lewis], has made the decision in answer to an unwanted pregnancy to terminate by lawful abortion." Lewis argues that we are bound to recognize a cause of action based on such allegations in light of precedent in which we have recognized that the classes protected by section 1985(3) extend beyond those defined only by race.

In *Action*, 450 F.2d at 1232-35, for example, we extended section 1985(3) protection to members of a predominantly white religious group whose services were disrupted by blacks demanding that the parish alter its investment policies.[4] In *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S.

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[4] To whatever extent our decision in *Action* was modified by *Scott*, the Supreme Court has left untouched our analysis in *Action* of class-based animus.

958 (1976), we held that the statute protects the right to vote in Indian tribal elections against interference from private conspiracies. *Id.* at 839. In *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978), we held that a woman had properly pleaded jurisdiction under the statute by alleging discrimination on the basis of her sex as well as race. *Id.* at 177. We have summarized the relevant standard this way:

> Most courts have extended protection to other suspect-like classes, such as those based on religion, or those defined by ideology or the exercise of a fundamental right. The ultimate test, of course, is whether the classification is sufficiently "invidious" so as to fall within the statute's ambit.

Shortbull v. Looking Elk, 677 F.2d 645, 649 (8th Cir.) (citations omitted), *cert. denied*, 459 U.S. 907 (1982). We have no doubt that the discriminatory classification alleged by Lewis is sufficiently invidious so as to merit statutory protection.[5] *See id.* at 648 (the Supreme Court "has implicitly held that discrimination on the basis of sex is sufficient under the statute" (citing *Great*

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[5] For additional instances in which courts have held that protection under 42 U.S.C. § 1985(3) extends to conspiracies to discriminate against persons based on gender, see *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988), *cert. denied*, 110 S.Ct. 243 (1989); *Williams v. Rappeport*, 699 F.Supp. 501, 505-06 (D. Md. 1988); *Chambers v. Omaha Girls Club*, 629 F.Supp. 925, 942 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987); *Scott v. City of Overland Park*, 578 F.Supp. 520, 528-29 (D. Kan. 1984); *Skadegaard v. Farrell*, 578 F.Supp. 1209, 1218-19 (D. N.J. (1984); *see also Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979). *But see Gibson v. United States*, 781 F.2d 1334, 1341 (9th Cir. 1986) (interpreting *Scott* to restrict "statutory coverage to conspiracies motivated by racial bias"), *cert. denied*, 479 U.S. 1054 (1987); *Harrison v. KVAT Food Management*, 776 F.2d 155, 160-63 (4th Cir. 1985) (statute does not protect Republicans as a class); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1177 (10th Cir. 1983) (statute does not protect class of handicapped persons), *cert. denied*, 465 U.S. 1103 (1984).

Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 389 n.6 (White, J., dissenting))).

Recently the Second Circuit, in *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990), decided a case which supports our holding here. The court affirmed the issuance of an injunction against "Operation Rescue" activities designed to deny access to abortion clinics. *Id.* at 1364. The court held that women were a protected class for the purposes of section 1985(3). *Id.* at 1359. "As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act." *Id.*

Appellees direct our attention to two recent Fifth Circuit cases, *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987), and *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989). The class in *Abortion Abolition Society* comprised two patients, two doctors, a legitimate abortion clinic and members of its staff, and an organization that provided escort services to the clinic. 811 F.2d at 932. Challenging protesting outside the clinic by anti-abortion activists, the plaintiffs characterized themselves as victims of a conspiracy against persons who do not share the conspirators' anti-abortion religious beliefs. *Id.* at 935. The court rejected this attempt to define a class on the basis of its absence of certain characteristics — religious beliefs opposed to abortion — that were possesses by the defendants in that case. The court concluded that in order to constitute a class within section 1985(3), the members of the protected group must "share at least some common characteristics beyond simply being victims of a conspiracy, a common characteristic that distinguishes the class from the rest of the population." *Id.* at 934.

McMillian affirmed the denial of a preliminary injunction in similar factual circumstances, but where the complaint pleaded

discriminatory animus against a class consisting of "women of childbearing age who seek medical attention from the [abortion clinic]." 866 F.2d at 794. The court held that the alleged defendant class was not motivated by class-based animus because their activities outside plaintiff's abortion clinic were aimed not only at the alleged class of pregnant women seeking abortions, but rather at a broad class of "men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Id.* *McMillan* concluded its analysis by contrasting the two cases:

> Thus, if the plaintiffs in *Abortion Abolition Society* identified themselves as a class that was so overinclusive as to be meaningless, [the abortion clinic in *McMillan*] has designated a class that is so underinclusive as to mischaracterize the dispute.

Id.

Lewis, by contrast, pleads that she is a member of a class which in relation to appellees' alleged discriminatory animus is neither overinclusive nor underinclusive. Lewis alleges that appellees' conspiracy was propelled by their invidiously discriminatory animus toward her by virtue of her membership in a class of women seeking abortions. Unlike the plaintiff class of *Abortion Abolition Society,* Lewis affirmatively alleges that appellees acted out of discriminatory animus against her based on her membership in a class of women, a class existing independently of appellees' actions. And, unlike the plaintiff class of *McMillan,* Lewis' alleged class is well-tailored. According to Lewis' complaint, those who staffed the Pregnancy Problem Center targeted women seeking abortions as their sole subject for harassment.

We are satisfied that the class proposed by Lewis is analogous to other in which protection has been afforded under section 1985(3). We further conclude that Lewis has adequately pleaded facts sufficient to meet all other elements of a cause of action

under 42 U.S.C. § 1985(3).[6] *See generally Griffin*, 403 U.S. at 102-03. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

FLOYD R. GIBSON, Senior Circuit Judge, dissenting.

I respectfully dissent because I believe that Lewis has not adequately stated a claim under section 1985(3). She has not shown that the state was involved in or affected by the conspiracy, and according to *United Brotherhood of Carpenters & Joiners of America v. Scott*, 463 U.S. 825 (1983), such a showing is necessary where, as here, the right allegedly violated is itself a right protected only against governmental rather than private interference. *Id.* at 833.

The majority apparently considers *Scott* to be distinguishable in that *Scott* involved an alleged violation of First Amendment rights, which are assertable only against governmental interference, while the instant case involves an alleged violation of the privacy right recognized in *Roe v. Wade*, which, the majority claims, is assertable against wholly private conduct. I disagree. The privacy right announced in *Roe v. Wade* is based primarily

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[6] Appellees also argue that Lewis' complaint fails because its allegations of "conspiracy" under 42 U.S.C. § 1985(3) are conclusory and unsupported by particular factual support. In her complaint, however, Lewis alleges that two corporations, the Pearson Foundation, Inc. and Mother and Unborn Baby Care of St. Louis, were involved in the formation and operation of the Pregnancy Problem Center. We accordingly hold Lewis' complaint to be adequate in this respect.

Appellees contend that Lewis' claim must fail under *Griffin* because she has alleged no medically diagnosable injury. Without deciding whether Lewis' claim of mental distress is alone adequate under the statute, we observe that Lewis has alleged the actual injury of losing one-and-a-half days' work.

Finally, appellee Chrismer attempts to raise a defense of privilege under the first amendment. We conclude that Lewis' complaint pleads deceptive practices and conduct sufficient to warrant further development of the record.

on the Due Process Clause of the Fourteenth Amendment. *See Harris v. McRae*, 448 U.S. 297, 312 (1980); *Roe v. Wade*, 410 U.S. 113, 153 (1973). And, it seems to me well settled and beyond dispute that the Due Process Clause protects individuals only against governmental interference and not against intrusions by private entities. *See, e.g., Scott*, 463 U.S. at 831-32 and cases cited therein. Even the language quoted by the majority to describe the Fourteenth Amendment right to privacy indicates that the right is only only against governmental action. *See* Maj. Op. at 8 (quoting the following language from *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2184 (1986); "[o]ur cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty *will be kept largely beyond the reach of government*." (emphasis added)). Accordingly, I am convinced that we are bound by the Supreme Court's decision in *Scott* to require a showing of state action in this case because Lewis, like the plaintiffs in *Scott* who sought to redress First Amendment rights, bases her section 1985(3) claim on a right that is by definition a right protected only against state interference.

Moreover, I am unpersuaded by the majority's reliance on this court's decision in *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc), and *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir.), *cert. denied*, 469 U.S. 838 (1984). I do not read *Action* to hold, as the majority states, "that first amendment rights of freedom of assembly and worship are protected not only against state action but also against private action." Maj. Op. at 9. Rather, in *Action* this court held that Congress has the power under the enforcement clause of the Fourteenth Amendment to proscribe private conspiracies that infringe First or Fourteenth Amendment rights and that Congress exercised that power in enacting section 1985(3). It seems to me that the *Action* court's consideration of whether Congress has the power to reach private action through the enforcement clause reveals an implicit recognition of the basic principle that First and Fourteenth

Amendment rights standing alone are indeed not assertable against wholly private conduct.

Further, I think it clear that *Action*'s holding that section 1985(3) can be used to redress violations of First or Fourteenth Amendment rights committed by private entities is no longer viable because this reasoning was rejected by the Supreme Court in *Scott*. And, this court's decision in *United States v. Bledsoe* is not to the contrary. The portion of *Action* that according to *Bledsoe*, survived *Scott* is the portion in which the court in *Action* held that Congress has the power to proscribe private conduct that infringes on Fourteenth Amendment rights. *Bledsoe*, 728 F.2d at 1097. I agree that *Scott* did not disturb that particular aspect of the decision in *Action*. But whether Congress has such power is not the precise question presented by the instant case. I recognize that Congress arguably has the power under both the Fourteenth Amendment's enforcement clause and the Commerce Clause to proscribe private conduct that violates Fourteen Amendment rights. *See Scott*, 463 U.S. at 833; *United States v. Guest*, 383 U.S. 745, 792 (1966) (Clark, J., concurring); *id.* at 782 (Brennan, J., concurring and dissenting). However, I submit that that proposition does not help Warna Lewis in her effort to state a claim under section 1985(3) because that statute is not one in which Congress exercised its power to reach private conduct that infringes on rights otherwise assertable only against private conduct. This was made abundantly clear in the following passage in the Supreme Court's decision in *Scott*:

> Neither is respondents' position helped by the assertion that even if the Fourteenth Amendment does not provide authority to proscribe exclusively private conspiracies, precisely the same conduct could be proscribed by the Commerce Clause. That is no doubt the case; but § 1985(3) is not such a provision, since it "provides no substantive rights itself" to the class conspired against. *Great American Federal Savings & Loan Assn. v. Novotny*, 442 U.S. 366,

> 372 (1979). The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment. Because that Amendment restrains only official conduct, to make out their § 1985(3) case, it was necessary for respondents to prove that the State was somehow involved in or affected by the conspiracy.

Scott, 463 U.S. at 833.

This court stated in *Bledsoe* that *Action* remained viable authority only for the proposition that Congress can reach certain private conduct under the enforcement clause. *Bledsoe*, 728 F.2d at 1097. *Bledsoe* did not state or imply that *Action* remained viable authority after *Scott* for the proposition that section 1985(3) can be used to redress private parties' violations of Fourteenth Amendment rights.[1] That proposition was completely discredited in *Scott* as the Court there made clear that section 1985(3) provides only a remedy for the violations of rights defined elsewhere. The right allegedly infringed in this case, Ms. Lewis' Fourteenth Amendment right to have an abortion within certain limits, is a right that protects her only against state interferences and is thus assertable in a section 1985(3) action only if the state was involved in or affected by the conspiracy.

I believe that the majority opinion in this case flies in the face of the fundamental principle, evident from the face of the Fourteenth Amendment itself, that the rights provided by that Amendment protect the individual only against state action. Congress can and in some instances has extended Fourteenth

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[1] *Bledsoe* did not even involve section 1985(3). In fact, the *Bledsoe* court distinguished section 1985(3) from the statute it was applying by stating: "The statute at issues in this case [18 U.S.C. § 245] is fundamentally different from section 1985(3) in that [§ 245] itself clearly creates a substantive right * * * *" *Bledsoe*, 728 F.2d at 1097.

Amendment rights to protect against private conduct, but it did not do so in section 1985(3). I would affirm the judgment of the district court on the ground that Lewis has failed to allege state action, a required element of a claim based on the Due Process Clause of the Fourteenth Amendment.

I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1293EM

Warna Irene Lewis,
Appellant,

vs.

Pearson Foundation, Inc., et al.,
Appellees.

Order Denying Petition For Rehearing
and Suggestion For Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

December 7, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1293EM

Warna Irene Lewis,
Appellant,

vs.

Pearson Foundation, Inc., Robert J. Pearson, Kathleen Pearson, John M. Byers, Mother and unborn baby care of St. Louis, d/b/a/ A-A-A Pregnancy Problem Center, Rita Roberson, Richard Chrismer, Marie Becker, Mary Elizabeth Kretschmer, Susan Schlesinger, Thomas Rohan, and Elizabeth Doe, a fictitious name,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

This court's order of December 7, 1990, is hereby amended by striking the last full sentence of the order.

December 17, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1293EM

Warna Irene Lewis,
Appellant,

vs.

Pearson Foundation, Inc., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

On the court's own motion, the orders of December 7, 1990, and December 17, 1990, are hereby vacated.

Appellant's petition for rehearing has been considered by the court and is denied.

January 10, 1991

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 87-0894-C-2

WARNA IRENE LEWIS,
Plaintiff,

v.

PEARSON FOUNDATION, INC.,
ROBERT J. PEARSON, KATHLEEN PEARSON,
JOHN M. BYERS,
MOTHER AND UNBORN BABY CARE OF ST. LOUIS,
d/b/a/ A-A-A Pregnancy Problem Center,
RITA ROBERSON, RICHARD CHRISMER,
MARIE BECKER, MARY ELIZABETH KRETSCHMER,
SUSAN SCHLESINGER, THOMAS ROHAN,
and ELIZABETH DOE, a fictitious name,
Defendant.

COMPLAINT

(Filed: May 14, 1987)

JURY TRIAL DEMANDED

1. Positing a moral-religious standard for all of society as well as themselves that, counter to positive law, views abortion at any post-fertilization stage as the prohibited killing of an unborn child, and deeming straightforward discourse and proselytizing inadequate to the task to which they have set themselves of steering pregnant women away from the choice of abortion, the defendants together have established a mock abortion clinic whose function it is to draw girls and women to it believing that they will there be provided an abortion, but who instead are visited by staff with a lacerating psychological attack upon their abortion decision and with all manner of trickery and deceit in

the effort to divert them from the exercise of this choice. The plaintiff, Warna Irene Lewis, sues on account of her ordeal in connection with such place.

2. The plaintiff's action arises under section 1985(3) of title 42 of the United States Code, providing a remedy for injury sustained by a private conspiracy to interfere with a person's entitlement to equal protection of the laws or equal privileges and immunities under the laws. Jurisdiction in this court is conferred by sections 1331 and 1343(a)(1) of title 28 of the Code.

3. The mock abortion clinic is located in the County of St. Louis, Missouri; acts constituting the section-1985 conspiracy and its effectuation occurred in the County of St. Louis, Missouri, and the City of St. Louis, MIssouri. The claim alleged therefore arose within the venue of this court.

4. The defendant Pearson Foundation, Inc. (hereinafter "Foundation"), is a not-for-profit, tax-exempt corporation organized under the laws of Hawaii, qualified to conduct its affairs in Missouri, and having its headquarters in the City of St. Louis, Missouri. It declares itself dedicated to the prevention of abortion by all means commensurate with the need to save the life of the unborn — and the soul of the abortion bound woman. In furtherance of its aims, it encourages and assists others, by the offer and provision of materials, training, and consultation, in the formation and operation of affiliated mock abortion clinics. The defendants Robert J. Pearson, Kathleen Pearson, and John M. Byers were at all times pertinent, and are, the corporate officers of the defendant Foundation. The defendant Byers is also its business manager. The defendant Mother and Unborn Baby Care of St. Louis is a not-for-profit corporation organized under the laws of Missouri, and, as one such affiliate of the defendant Foundation, operates a mock abortion clinic above referred to, located at 3550 McKelvey Road, Bridgeton, Missouri, and advertised to the public as "A-A-A Pregnancy Problem Center"

(or sometimes just "Pregnancy Problem Center"). The defendants Rita Roberson, Richard Chrismer, and Marie Becker were at all pertinent times, and are, the directors of the defendant Mother and Unborn Baby Care of St. Louis, d/b/a/ A-A-A Pregnancy Problem Center (hereinafter "A-A-A"). The defendants Roberson, Mary Elizabeth Kretschmer, Susan Schlesinger, and Thomas Rohan, were at all pertinent times, and are, its corporate officers. The defendant "Elizabeth Doe," if not also one of its above named directors and officers, was at the time of the plaintiff's visit to A-A-A one of its volunteer staff members or employees; this defendant's full name is not now known, and she is therefore designated by this fictitious name.

5. A-A-A, like other Foundation-inspired centers, operates in accordance with a manual titled "How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center," written by the defendant Robert J. Pearson and issued by the defendant Foundation. This manual is a blueprint and script for the running of a mock abortion clinic. It instructs on how deceptively to advertise so as to attract girls and women who are seeking an abortion, while hiding the center's pro-life philosophy; on how to evade callers' questions that would reveal the true mission of the center; on ways to make the facility look and act like a medical clinic that does abortions; on the method of conducting the office intake of the woman so that she is unsuspectingly rendered a captive audience for the viewing of a Foundation-produced slide show, the centerpiece of the efforts to jolt the woman from her decision to obtain an abortion.

6. Following the manual's suggestions on advertising, A-A-A placed in the 1985-86 Southwestern Bell Yellow Pages for the St. Louis area, under the heading "Abortion Information and Services," a display ad which (except for its multicoloring) appeared as follows:

PREGNANCY PROBLEM CENTER

FREE PREGNANCY TEST

RESULTS IN 30 MINUTES

WALK-IN OR CALL

PREGNANCY • ABORTION INFO

COMPLETELY CONFIDENTIAL

SUITE 102

3550 McKelvey 291-4458

7. The plaintiff, on September 29, 1986, nearing the end of the first trimester of a pregnancy and having determined that it was in her best interests and that of her ten-month-old child to end this pregnancy by an abortion, searched the mentioned yellow pages for a facility where she could have the abortion done. She there found A-A-A's ad above duplicated. From her reading of the ad she believed A-A-A to be a place where she could secure abortion services. She called the number given and stated that she needed help in obtaining an abortion. The person with whom she spoke replied that they would help the plaintiff all they could, that she should come in and take the free-pregnancy test and they'd take it from there. Nothing was said about the stance of A-A-A against abortion or that it did not do them. The plaintiff therefore continued to believe that this place provided the services she sought, and she scheduled an appointment there for October 1, 1986.

8. Upon appearing at A-A-A on that date for her appointment, the plaintiff was first directed by the receptionist to a rest room to produce a urine sample for pregnancy testing. Shortly after

complying and after giving requested personal information to the receptionist, the plaintiff was shown to a back room of the facility by another of its staff members, the defendant Doe (who identified herself to the plaintiff only as "Elizabeth"). The defendant Doe then excused herself for the purpose of attending to the pregnancy testing, but told the plaintiff she wanted her to watch a slide show while she was gone. As the defendant Doe left the room, she switched on the audio-visual equipment there present.

9. There next appeared before the plaintiff the Foundations' slide presentation, which, without any forewarning to her or awareness on her part of what was to come and fully against her desire knowingly to submit to such, featured a series of grisly, shocking, and terrifying depictions of what was said to be involved in the abortion procedure. The color slides included view of dismembered parts of fetuses and of advanced fetuses piled in buckets, and purported to show women having abortions done by means of crude-appearing instruments. The slide presentation as a whole mixed scenes such as these with happy-family scenes and with discussion of the medical "facts" in connection with abortion, these being select, distorted, misleading, or false. The presentation was given solely with the intent to produce fright, horror, sorrow, and guilt in an unprepared and, by the very circumstances that brought her to this place, emotionally sensitized viewer. It had particular impact upon the plaintiff, who some sixteen years earlier, at seventeen years of age, had had an abortion following a rape and whose present life situation, in the depths of her deliberations about it, admitted of no alternative to an abortion. What she had been shown, and the realization that she was at a place which could do anything but fulfill her pressing needs, gave rise in the plaintiff to great upset, anxiety, anguish, and anger.

10. These feeling the plaintiff conveyed to the defendant Doe when she reappeared in the room right after the slide show ended.

In answer to the plaintiff's explanation of why she had decided that she must have the abortion, the defendant Doe beseeched the plaintiff to trust herself and the problems she described to religious faith. When the plaintiff rejected this and other proffered solutions of the defendant Doe, this defendant finally expressed acceptance of the plaintiff's decision and asked her whether she'd like arrangements made to have the abortion done by "a respectable doctor." The plaintiff, having now been set back in the obtaining of her abortion and fearing time to be of the essence, accepted the defendant Doe's offer of assistance in this regard. The defendant Doe then left the room. She shortly returned and gave the plaintiff her handwritten note showing that an appointment had been made for the plaintiff at St. John's Mercy Medical Center on the second day following, October 3. When the plaintiff inquired of this defendant whether the physician would perform the abortion on that day, the defendant Doe answered that she assumed he would.

11. In such anticipation, the plaintiff, on October 3, 1986, went to St. John's Mercy Medical Center for her appointment. But upon making known to the staff there that she had come for an abortion, she was told that this could not be done because the hospital, as a Roman Catholic institution, did not perform abortions. Realizing now that in her time of need she had been twice the victim of duplicity by A-A-A, the plaintiff, feeling extreme indignity and humiliation at this, broke down emotionally at the hospital. Though kindly and patiently comforted by the physician with whom she had been scheduled at St. John's, the plaintiff departed the hospital and remained for a good period thereafter in a state of dazedness, sadness, tearfulness, and anger.

12. The defendants Doe and A-A-A knew when they sent the plaintiff to St. John's Mercy that this hospital did not perform abortions. It is stated on information and belief that the hospital in fact had previously instructed A-A-A not to send abortion-seeking women there, when A-A-A had done this before. A-A-A's sending

of the plaintiff to St. John's Mercy was done solely as a further attempt to thwart her in her efforts to obtain an abortion.

13. In this A-A-A was not successful; the plaintiff secured her abortion in the following week. Thereafter, on November 11, 1986, the defendant Doe telephoned the plaintiff at her place of work and, after identifying herself, told the plaintiff that she had called just to see when the plaintiff's baby was due and if everything was alright. This and the exchange that ensured, felt by the plaintiff to be intolerable harassment, upset the plaintiff to the point that she had to cease her work for a half hour.

14. Further pleading, the plaintiff states that the establishment and operation of A-A-A, the placement of the foregoing ad in the Yellow Pages, and all of the things and acts done to and committed upon the plaintiff by the defendant Doe and other engaged on behalf of A-A-A, as above described, were done and committed pursuant to a conspiracy among all the defendants herein named and of each of them with each other. The plan and objective of the conspiracy was and is, by means of guile, deceit, trickery, lying, imposition of guilt, and intense psychological disruption, to prevent as many women as possible from obtaining abortions. The conspiracy is therefore motivated by an invidiously discriminatory animus toward a class of women each of whom, like the plaintiff herein, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion. The conspiracy seeks to deprive such abortion-seeking women of the equal protection of the laws and of their equal privileges and immunities under the laws by denying to them their constitutionally granted rights of privacy, autonomy, personhood, and liberty in exercising a choice as to the continuation or discontinuation of a pregnancy.

15. Further, the conspiracy and all the acts committed as part of it, were made and done with the intention of causing major psychological disturbance, trauma, and injury to members of the

targeted class, including the plaintiff, and hence were made and done willfully, wantonly, and maliciously, all as intensified by the fervor special and unique to those self-martyred to a boundless cause of the salvation of others, as these defendants professedly were.

16. Moreover, the defendants' conspiracy has, wittingly or unwittingly, been aided and abetted by the refusal of the Missouri attorney general, upon the complaints and reports that have been made to him about the methods of the fake abortion clinics in general and A-A-A in particular, to invoke the broad statutory and common law remedies at his disposal (and readily employed by him in other instances certainly no more egregious than this one) to prevent these places from engaging in the deceptive advertising practices on which their success depends. The attorney general has further encouraged the defendants' conspiracy by his public pronouncements that the defendants' advertising does not, in his opinion, constitute misrepresentation. It is stated that the attorney general, in the face of the patent and widely successful misbranding of services of the fake abortion clinics, has refrained from action solely due to the highly charged controversy surrounding legalized abortion and because of either his personal concurrence with the activities of A-A-A and like places or his desire not to displease any element of his pro-life constituency, no matter how extreme the tactics chosen may be. The consequence of this failure of due protection has been avoidable harm to the plaintiff and others who have been drawn to these places under false, but not unreasonably acquired, notions that they are place providing abortion services.

17. Though the plaintiff was not defeated in her efforts to get the abortion she had decided upon, she did suffer — and still suffers and will in the future suffer — as a result of her decision and the defendants' concerted training upon her for it, actionable injury in the form of mental distress, torment, anxiety, anguish, morbid recall, sadness, embarrassment, humiliation, and anger.

On a lesser scale, but of injurious consequence just the same, the plaintiff was caused by the defendants' deception to lose time from work to go first to A-A-A and then on a second day to St. John's Mercy, for which she took a total of a day and a half of vacation time.

WHEREFORE the plaintiff requests judgment for actual damages in the amount of $150,000 against all the defendants jointly and severally. The plaintiff additionally requests judgment for punitive damages in the following amounts: $10,000,000 each against the defendants Pearson Foundation, Inc., Robert J. Pearson, and Kathleen Pearson; $250,000 each against the defendants John M. Byers, Mother and Unborn Baby Care of St. Louis, Rita Roberson, and "Elizabeth Doe"; and $100,000 each against the defendants Richard Chrismer, Marie Backer, Mary Elizabeth Kretschmer, Susan Schlesinger, and Thomas Rohan. The plaintiff also requests that she be awarded interest, attorney's fees, and costs of court.

/s/ Tom Mendelson
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FILED
MAY 8 1991
OFFICE OF THE CLERK

No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

VS.

PEARSON FOUNDATION, INC., et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Implicitly recognizing no independent reason for this Honorable Court to grant certiorari on the flowery and exaggerated allegations of the Petition, the Petitioner, in an untimely manner, instead tries to ride the coattails of *Bray v. Alexandria Women's Health Clinic*, No. 90-985. In *Bray* a right to travel theory (not present in the instant case) is tried for application of 42 U.S.C. § 1985(3) against actions designed to rescue unborn children against human abortion. Although cavernous differences between these two cases exist, the questions presented to this court in this case are as follows:

1. Was the Petition for Writ of Certiorari timely filed?

2. Was 42 U.S.C. Section 1985(3) intended to protect against other than racial or racially-related discrimination?

3. Does a moral belief against abortion meet the requirement of a class-based invidious discriminatory animus necessary in order to state a claim for relief, and is the class attempted to be asserted by the Appellant a protected class?

4. A "fundamental right to abortion" does not exist, but whatever right or interest that does exist, if any, does not exist against private conduct.

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No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

vs.

PEARSON FOUNDATION, INC., et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

I. Allegations and Non-Allegations of the Complaint

Nowhere in the Petition is it claimed that the Petitioner was deprived of a constitutional right to interstate travel (and this possible theory is specifically disclaimed by the Appellant, App. Br. 14, footnote 1).

Plaintiff Warna Lewis bases her civil claim for money damages on 42 U.S.C. Section 1985(3) and alleges mental distress, anxiety, anguish, and anger among her damages. Appellant's

Brief A-43, 44. But she does not claim any medical bills, lost earnings, or special damages of any kind except for a day and a half of vacation time. App. Br. A-44. The suit is sponsored by the American Civil Liberties Union. App. Br. A-44.

Plaintiff initially brought her action for money damages against Respondents Mother and Unborn Baby Care of St. Louis d/b/a Triple A Pregnancy Problem Center, a counseling center she visited twice without charge, the Pearson Foundation, Inc., various corporate officers and directors, some workers, and "Elizabeth Doe", alleged to be one of the center's staff members or employees. App. Br. A-37, 38. She alleges no contact or dealings with Defendants, Pearson Foundation, Inc. or any of its officers or directors. The Plaintiff is not proceeding against Defendants Robert J. Pearson and Kathleen J. Pearson as reflected by her footnote on page ii, and therefore said individuals are no longer part of this appeal.

Plaintiff objects to the operation of what she claims is a fake abortion clinic, and recites that she was misled by an ad, and was shown an audio-visual presentation of an abortion. App. Br. A-39, 40. She claims she was misled but did later obtain the abortion she sought shortly thereafter. App. Br. A-42.

Plaintiff asserts that there was a conspiracy against her which was aided and abetted by the refusal of the Missouri Attorney General, who publicly stated his opinion that the Defendants' advertising does not constitute misrepresentation. App. Br. A-43.

The District Court sustained Motions to Dismiss filed by all Defendants and issued an opinion. By a two to one decision the three-judge panel overruled the District Court dismissal, however, the Court en banc vacated the three-judge panel decision and affirmed the dismissal of the District Court.

A Petition for Writ of Certiorari was filed on April 10, 1991 when the original order denying rehearing occurred on December 7, 1990. The timeliness of the Petition, *inter alia*, is later raised.

II. Proceedings in the Courts Below

At the trial level, questioning whether the Petition stated a claim for relief under Section 1985(3), the Respondents moved to dismiss the Complaint. Since the Petitioner's brief pays scant attention to the District Court decision, the controlling law of this case, it is necessary for these Respondents to adequately set forth the same.

After setting forth the facts obtained from the petition, the district court identified and addressed two particular issues. First, since the Plaintiff brings her complaint against *private actors*, does Section 1985(3) require state action to assert privacy and liberty claims found in the Fourteenth Amendment; and, secondly, is Plaintiff's asserted class such a class as is intended to be protected from invidious discriminatory animus by Section 1985(3). *Lewis v. Pearson Foundation, Inc.*, No. 87-894C(2) (E.D. Mo. Jan. 15, 1988).

Tracing the Supreme Court law on the subject, and citing *Griffin v. Breckenridge*, 403 U.S. 88, 102, 103 (1971), the district court observed that *Griffin* also applied the legislative history of the statute to require a class-based, invidiously discriminatory motivation behind the conspirator's action. In order to avoid the constitutional shoals that would lie in the path of interpreting § 1985(3) as a *general federal tort law*, the congressional purpose of requiring invidiously discriminatory motivation must be honored. There must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions. *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 834, 835 (1983).

In applying this intended narrow interpretation, the Supreme Court later held that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than the animus against Negroes and those who championed their cause, most notably Republicans". It was ruled that a First Amendment right not to associate with a union did not fall within the purview of § 1985(3). In *Griffin*, however, the conspiracy was held to have been motivated by class-based animus against blacks and their supporters. The District Court found, and relied upon, a similar case, treating the threshold requirement that the class relied upon for jurisdiction, actually be a "protected class". In *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 108 S. Ct. 145 (1987), the alleged "victims" were also persons exercising their so-called "right" to an abortion or to provide abortions.

The District Court analyzed the need for class-based invidiously discriminatory animus, which Section 1985(3) was intended to protect against. *Lewis v. Pearson, supra*, E.D. Opinion. In its quest to determine whether the need was fulfilled, the averments of the Petition, framed by the appellant herself, were copiously reported. The Plaintiff goes out of her way to complain of what she perceives as the religious interest of all of the defendants. App. Br. A-11. She states that the motivation of the defendants is a moral-religious belief against abortion, in the words of appellant: "Positing a moral-religious standard for all of society . . ."; and "all as intensified by the fervor special and unique to those self-martyred to a boundless cause of the salvation of others, as these defendants professedly were." App. Br. A-11. However, the court points out, this "class" does not exist independently of defendants' actions, nor is there a common characteristic distinguishing the class from the rest of the population. App. Br. A-11. This alleged "religiously motivated conspiracy" transcends denominational religious lines. It is no more of a common trait or characteristic than would be a belief in using

seatbelts or in an ever-expanding universe. *Lewis v. Pearson, supra*, E.D., citing *Roe v. Abortion Abolition Society, supra*, at 935.

Since the Petition was obviously deficient for these reasons, other failings such as the lack of necessary state action, were not even necessary to be addressed.

With respect to the three-judge panel, an opinion later vacated by the court en banc, two of the three judges sought to expand application of Section 1985(3), even though admitting that *Scott* makes clear that Section 1985(3) creates no substantive rights. *Lewis v. Pearson*, 908 F.2d 318, 322 (8th Cir. 1990), *vacated*, No. 88-1293 (8th Cir. September 7, 1990) (en banc). The majority felt that § 1985(3) does not contain a state action requirement where the Plaintiff's claim finds its course in the rights announced in *Roe v. Wade*, and assumed that the so-called right to an abortion announced in 1973 remains in full force, and has not been watered down to the status of a general liberty interest (if a liberty interest at all).

The majority of the three-judge panel, making great strides towards establishing this statute as a general federal tort law, seemed to imply that § 1985(3) could be applied to deprivation of any equal protection of the laws, including trespass laws, contract laws, property laws, and tort laws. It was said that these sorts of rights have a life all their own, with or without state action, and therefore § 1985(3) applies. *Lewis*, at 323. The limitations of this "shotgun approach", if any, remain undefined. Since the majority ruled that no state action was required, it would not appear necessary or consistent for the majority to find state action. However, the opinion did equate a statement by the Attorney General that the center's advertising does not constitute misrepresentation, with active encouragement and participation in the alleged conspiracy. *Lewis, supra*, at 323.

The majority of the three judges did concede that *Griffin* involved the Thirteenth Amendment and the constitutional right of interstate travel. *Griffin, supra*, 104-06. In the instant case, Lewis claims no constitutional rights of interstate travel whatsoever, and in fact affirmatively denies the same in her brief. App. Br. 14, footnote 1.

Just as the prevailing District Court opinion was short-changed by the Petition for Writ of Certiorari, similarly the holding of the dissenting judge was afforded one paragraph attention by the Petitioner. The dissent (eventually the prevailing *result* because the three-judge opinion was vacated and the District Court opinion upheld) found it clear that the state must be demonstrated to be involved in or affected by the conspiracy. Since the Petition failed on its face to do so, a claim under Section 1985(3) was not stated. No discussion of other deficiencies was necessary, because the Petitioner was obliged to fulfill every essential element of a § 1985(3) showing. In other words, if a Petition is defective for five reasons, a finding that it is faulty on two followed by absence of discussion of the other three, does not imply approval of the other three deficiencies.

The dissent held that since the so-called right to abortion is protected only against governmental rather than private interference, it is logical that state action is required. *Lewis, supra* at 327, citing *Scott* at 833.

More particularly, as the so-called "privacy right" is based primarily on the due process clause of the Fourteenth Amendment, and since the due process clause protects individuals only against governmental interference and not against intrusions by private entities, state action must be required. *Lewis, supra* at 326.

The dissent observed that § 1985(3) is not a statute in which Congress exercised its power to reach private conduct that infringes on rights otherwise assertable only against private conduct. The fundamental principle, evident from the face of the

Fourteenth Amendment itself, is that rights protected by that amendment protect the individual only against state action. *Lewis*, at 327. Lewis failed to allege state action, a required element of a claim based on the Due Process Clause of the Fourteenth Amendment.

The Court en banc vacated the three-judge panel decision and affirmed by equal vote the dismissal of the District Court. The Honorable Floyd R. Gibson, a dissenting judge who voted to affirm the District Court's opinion, did not participate in the en banc decision.

REASONS FOR DENYING THE PETITION

I.

THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED

Supreme Court Rule 15.4 states that no Motion by a Respondent to Dismiss a Petition for Writ of Certiorari will be received. Objections to the jurisdiction of the Court to grant a Writ of Certiorari may be included in the brief in opposition. Therefore, no separate motion has been filed by these Respondents.

Supreme Court Rule 13, also treated by statute 28 U.S.C. Section 2101(c) (1982 Ed.), requires that a Petition for Certiorari in a civil case be filed within ninety days after entry of the judgment below. This ninety day limit is mandatory and jurisdictional. There is no authority to extend the period for filing except as Congress permits. Unless the Petition is filed within ninety days of the entry of judgment, the Petition must be dismissed. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1660 (1990).

The history is an follows. On October 14, 1990 the judgment of the District Court was affirmed. App. Br. A-1, 2. The Petitioner says she filed a "Petition for Re-Hearing" on November 6, 1990 which was denied on December 7, 1990. App. Br. A-33. The December 7, 1990 order is quite clear in that the Court denied relief requested by the Appellant. The specific language is "Appellant's suggestion for rehearing en banc has been considered by the court and is denied for reason of the lack of a majority of the active judges voting to rehear the case en banc. Petition for rehearing by the panel is also denied."

The Petitioner, not liking this wording, obtained a revised order entered on December 17, 1990,which struck only the last full sentence of the December 7, 1990 order. App. Br. A-34. The December 17, 1990 order was merely a clarification of the

language set forth in the December 7, 1990 order, and in no way altered the result against the Appellant. The December 17, 1990 order did not change the December 7, 1990 order except for the last full sentence of the December 7, 1990 order.

Still complaining about the technical wording selected by the court, Petitioner obtained another clarification on January 10, 1991, which order vacated the December 7, 1990 and December 17, 1990 orders, and this time recited that "Appellant's Petition for Rehearing has been considered by the Court and is denied." App. Br. A-35. Again, affirmance of the District Court's judgment was not disturbed. The technical language was different, but the court in its orders of December 7, 1990, December 17, 1990, and January 10, 1991 steadfastly held to its ruling denying relief to the appellant, and did not in any way disturb the judgment of the District Court, and did not revise any legal rights or obligations disposed of by the District Court. The judgment previously entered on December 7, 1990 was re-entered or revised, but this did not toll the time within which review must be sought. It was always clear that the requests of the Petitioner-Appellant were denied. Nothing of substance was changed.

> "Thus, the mere fact that a Judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered, should the period within which an appeal must be taken or a Petition for Certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Federal Trade Commission v. Minneapolis Honeywell R. Company*, 73 S. Ct. 245, 249 (1952)

That the Eighth Circuit Court of Appeals engaged in a series of clarifications to set the record straight, rather than changing a substantive ruling, is documented by the appellant's Petition where she notes "As the court of appeals ultimately made straight of record, the petitioner's filing of November 6, 1990, was a *petition* for rehearing relative to the court's en banc determination of October 24, 1990, and not a *suggestion* for rehearing *en banc*. The filing is therefore one made under Rule 40, and not Rule 35, of the Federal Rules of Appellate Procedure." App. Br. 2, 3." The appellant was merely trying to have the record reflect that her filing was a petition for rehearing en banc and not a suggestion for rehearing en banc. She was, in her words, merely "making straight the record".

In *Missouri v. Jenkins, supra*, the Supreme Court discussed the issue of whether a pleading filed was a "Petition for Rehearing" or "Suggestions for Rehearing En Banc". On October 14, 1988 the Court of Appeals denied the Petitions for Rehearing En Banc. On January 10, 1989, the Clerk of the Eighth Circuit issued an order amending the order of October 14, 1988, recalling the Court's mandate issued on October 14, 1988, and ordering that "the Petitions for Rehearing and the Petitions for Rehearing with Suggestions for Rehearing En Banc are denied. This order is entered nunc pro tunc effective October 14, 1990." *Jenkins* at 1659.

The court found that the Petition was timely filed because it was treated as a "Petition for Rehearing". However, the calculation as to whether the Petition was timely filed was computed as of October 14, 1988 (the original order), not January 10, 1989 (the amendment).

In other words, *Jenkins* held that the initial order was a denial of rehearing, but calculated the ninety day period from the date of the original October 14, 1988 order, rather than the later January 10, 1989 order. In the present case, Lewis would have

this court compute the time limit for filing her Petition to commence from the very last order entered, rather than from the denial of rehearing on December 7, 1990. This is opposite and contrary to the time calculation of the Supreme Court in *Missouri v. Jenkins, supra.*

In *Lewis*, the subsequent orders of December 17, 1990 and January 10, 1991 App. Br. A-34, 35 were merely formal clarifications (like the nunc pro tunc order in *Jenkins*), not dispositive rulings or reconsiderations of the December 7, 1990 order. Therefore, the ninety day period ran from December 7, 1990 and Lewis' Petition for Certiorari filed on April 10, 1991, is over a month untimely.

One last point on the lack of jurisdiction of this court should be made. Petitioner presumably assumes that the Eighth Circuit can in effect grant an extension of time to file a Petition for Certiorari simply by vacating and re-entering its previous order. However, there appears to be no statutory authority for a United States Court of Appeals to grant additional time for the filing of a Petition for Writ of Certiorari, and in fact, the Petitioner did not specifically request additional time. Supreme Court Rule 13.2 does recite that "A Justice of this Court, for good cause shown, may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days". However, this was never requested, and furthermore the request for extension must come before the time expires and the court loses jurisdiction of the case.

The Petition for Writ of Certiorari should be denied because of lack of jurisdiction of this Court.

II.

ALTHOUGH THE COURT HAS GRANTED CERTIORARI IN *BRAY v. ALEXANDRIA WOMEN'S HEALTH CLINIC*, THAT CASE WAS DECIDED ON THE BASIS OF WHETHER A FEDERAL CONSTITUTIONAL RIGHT TO INTERSTATE TRAVEL IS VIOLATED BY ANTI-ABORTION ACTIVITIES WHERE SOME OF THE CUSTOMERS CAME FROM OUT OF STATE. NO SUCH ISSUE EXISTS IN THE PRESENT CASE

The Petitioner herein, unable to find an independent reason for the Court to grant certiorari in this case, tries to copy from *Bray v. Alexandria Women's Health Center*, No. 90-985. Since the Petitioner relies so heavily on *Bray*, these Respondents will discuss this litigation more than would ordinarily be the case.

Perhaps the best reason this Court should deny certiorari in *Lewis* but grant certiorari in *Bray* (referred to in the lower courts as *National Organization For Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) and 726 F. Supp. 1483 (E.D. Va. 1989) but referred to in this Court and here as *Bray*) is that the court in *Bray* dramatically expanded the scope of § 1985(3), an error which needs to be corrected; whereas in the instant case, no such mistake was made. The error in *Bray* cries out to be corrected, but appellant *Lewis*, on the other hand, has no business using § 1985(3) as armament for a general tort law claim. Thus the disposition of the present litigation is well-deserved and should not be disturbed.

Secondly, although the *Petitioner* lifts two issues from *Bray* and attempts to employ it to her advantage, it is clear that the authority in *Bray* was provided, if at all, by application of a federal constitutional right to travel. It should be remembered that Section 1985(3) provides no substantive rights itself, but only vindicates rights found elsewhere. *Scott, supra*, at 833. In

Bray, the basis of the ruling was the constitutional right to travel. *Bray*, 914 F.2d 582, 585. The three-judge panel, citing the district court, thought that rescue demonstrations interfere with the *right to travel* because women seeking the services of clinics in the Washington metropolitan area travel interstate to obtain these services. *Bray*, 914 F.2d 582, 585. Though most would dispel this theory as far-fetched, in *Bray* the issue as framed by the trial court was "Conspiracy to Interfere with Plaintiff's Right to Interstate Travel. Pursuant to 42 U.S.C. Section 1985(3)". *Bray*, 726 F. Supp. 1483, 1492 (E.D. Va. 1989). It is true that there was discussion of "class-based discriminatory animus", but a fair reading of the case reveals that the right to interstate travel was the foundation of the ruling.

In *Bray*, 726 F. Supp. 1483, 1493, the district court observed that the Plaintiff's *also alleged* that the Defendants rescue demonstrations violated § 1985(3), because they infringe on the so-called fundamental right of Plaintiff's members to obtain an abortion. This portion of the opinion, not found in favor of the plaintiff, is more like the claim of Lewis. The court recognized "the likely absence of state action" (*Bray* at 1493) and indicated in footnote 11 that the Plaintiffs must demonstrate some state action when the asserted constitutional deprivation is based upon a right guaranteed against government interference, such as the so-called right to abortion. The court commented that it "need not reach the merits of this doubtful argument" (that necessary state action was present when rescuers refuse to notify police). Thus, if Lewis relies on *Bray*, as she does, she should also reconcile the holding that state action must exist when the deprivation is based on a right against government interference.

The district court also cogently observed that "the law concerning putative abortion is in a state of flux". *Bray*, 726 F. Supp. 1483, 1494. It said that the decision of *Webster v. Reproductive Health Services* left *Roe* ripe for attack, noting Justice Rehnquist's observation that *stare decisis* has less power in constitutional

cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. It cited the note of Justice Rehnquist that the *Roe* trimester framework falls into the category of being "unsound in principle and unworkable in practice". See footnote 13 on p. 1494 of panel opinion. Several instances emptying content of *Roe* were cited, even though *Roe* may not have been explicitly overruled. The point here is that it is unwise to rest the application of § 1985(3) on a so-called right to abortion, which may be no right at all or only a liberty interest, which is in terminal stages of retreat.

Although, even in *Bray*, it seems a stretch of the imagination to conclude that a constitutional right of interstate travel is interfered with just because some of the patrons of a business come from another state, which theory could be applied to almost any place located near the border of another state, or any business which uses mail sent from or delivered to another state, in this the *Lewis* case, the issue is specifically *disclaimed*. Appellant Lewis says "This question (violation of a federal constitutional right to interstate travel) is not tendered in the present case because, *in contrast to Bray*, it involves one individual plaintiff . . . whose complaint therefore shows no interstate travel." App. Br. p. 14 footnote 1, emphasis supplied.

Thus, when appellant Lewis identifies the questions in *Bray* as, except for violation of a constitutional right to travel, in substance the same as the ones herein, such identification is not genuine because without a finding that a constitutional right to travel was violated, other issues would never have been reached and addressed.

Appellees herein also observe that, although much litigation appears as a result of rescuers attempting to save lives through interference with access to abortion mills, few, if any, cases have been pursued on federal grounds in the context of a counseling situation. We submit that this is indicative of not only the novelty

of Appellant Lewis' position, but more to the point, its lack of merit.

For example, the District Court in *Bray* notes in an interesting fashion that an injunction request against activities that "tend to intimidate, harass or disturb patients" is overbroad. *Bray*, 726 F. Supp. 1483, 1497. The Defendants' First Amendment right to express views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of defendants' views on the issue of abortion. *Bray, supra.* Indeed, the First Amendment concept of a "free marketplace of ideas", taken seriously, necessarily entails that a citizen of a democracy has a duty to listen open-mindedly to opposing views on vital issues." See footnote 16 of District Court opinion. The alleged conduct of the Defendants in this case, even if offensive to the Plaintiff, fits squarely within the First Amendment concept of expression of opposing views.

Thus, *Bray* cannot fairly be compared to the present case. The similarity of one or two issues in a case decided on other grounds (right to travel), is not reason to say that the cases are essentially the same or involve substantially identical issues. Such an approach is ingenuous, and if the similarity of an issue in a case accepted by the Supreme Court is good reason for acceptance of another case, then Appellees respectfully submit that virtually every case filed in the federal system would be heard by the Supreme Court.

This Court, instead, should decline jurisdiction, such as it did in *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 108 S. Ct. 145 (1987).

III.

42 U.S.C. SECTION 1985(3) WAS NOT INTENDED TO PROTECT AGAINST OTHER THAN RACIAL OR RACIALLY-RELATED DISCRIMINATION

Aside from the great differences between *Bray* and *Lewis*, and the Appellant's faulty concept that if an appellate court accepts one case it should accept them all, the underlying law, fatally defective to the Appellant, fails to provide justification for extending § 1985(3) to unintended ends.

One would think that the intent of lawmakers making a law would provide a reasonable explanation of the coverage of that law. However, the Petition fails to mention, even in passing, the intent of Congress when this statute was passed. Since the meaning and application of § 1985(3) is the heart of Appellant's claim, the failure to mention legislative history is an indication that indeed no support for extension of § 1985(3) to the scope advanced by Appellant, was ever intended by the writers of the law.

It is significant to note that the passage of the Ku Klux Klan Act was in response to widespread violence and acts of terror directed at *blacks and their supporters* in the post-war South. Violent resistance to the changes of the reconstruction era in many southern states, including the transition from a slave to a free society, was led by a coalition of some southern Democrats and the Ku Klux Klan. The primary goal of this resistance was viewed by Congress as the dismantling of the system of reconstruction, as well as the dilution of political rights gained by blacks through the post-Civil War Constitutional Amendments. *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155, 157 (4th Cir. 1985).

The majority in Congress believed legislation was necessary to stem the tide of violence against blacks. The failure or

inability of local southern governments to control the Klan was troubling to Congress. *Harrison, supra*, p. 157. The legislative history of the Ku Klux Klan Act of 1871, of which Section 1985 is a part, indicates that this enactment was intended as an enforcement vehicle for the Thirteenth Amendment. Congress intended to provide black persons equal protection of the laws of the United States.

Against this back-drop of political terrorism, Congress enacted what is now 42 U.S.C. § 1985(3) affording a remedy for the vindication of the civil rights of those being threatened and injured, blacks, and advocates of the black cause. *Harrison, supra*, p. 157. See also: *Comment, A Construction of 1985(3) in Light of its Original Purpose*, 46 U. Chi. L. Rev. 402, 427 (1979) wherein it is stated that some courts and commentators have erroneously viewed the Ku Klux Klan Act as a general anti-discrimination statute, applying it to a broad range of inequalities never intended by the drafters of the act.

Thus, it is clear that Congress passed this statute as a cure for racial discrimination. Appellant, however, seeks to misapply this statute so that it somehow covers "a class of women who desire abortions".

The most recent United States Supreme Court case on the subject has questioned whether, "in the first place, Section 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *United Brotherhood of Carpenters and Joiners of American et al. v. Scott*, 463 U.S. 825, 836 (1983). The Court continues that the predominant purpose of Section 1985(3) was to combat the prevalent animus against Negroes and their supporters, which included Republicans. *Scott*, at 836. Even *Griffin v. Breckenridge, supra*, involved a racial problem. Congress has not expanded the scope of this statute, although it has had opportunity to do so. It should remain limited to conspiratorial discrimination based on race.

IV.

A MORAL BELIEF AGAINST ABORTION DOES NOT MEET THE REQUIREMENT OF A CLASS-BASED INVIDIOUS DISCRIMINATORY ANIMUS NECESSARY IN ORDER TO STATE A CLAIM FOR RELIEF, UNDER 1985(3); AND THE CLASS ATTEMPTED TO BE ASSERTED BY THE APPLICANT IS NOT A PROTECTED CLASS

As part of the continuing policy of Appellant to introduce into her brief any material desired, whether or not contained in the record, she purports to quote from a manual of Defendant Pearson Foundation. App. Br. 21, 22. No such extracts are anywhere recited in the Complaint. And for support of the allegations that were pled, appellant resorts to, among scant other citations, references to newspaper articles and a magazine.

As recited by the District Court, the Plaintiff frames her Complaint in terms of "moral-religious" beliefs of the Defendants. App. Br. A-11. The Complaint asserts that the Defendants:

> "posit a moral-religious standard for all society as well as themselves" . . . (they) view(s) abortion at any post-fertilization stage as the prohibited killing of any unborn child . . ." App. Br. A-36.

The Complaint continues to say that the Defendant Pearson Foundation, Inc., declares itself dedicated to the prevention of abortion by all means commensurate with the need to save the life of the unborn and the soul of the abortion bound woman, A-37, specially and unique to those self-martyred to a boundless cause of the salvation of others, and these Defendants professedly were. A-43. Thus, as pointed out by the District Court, it is claimed by Appellant Lewis that the motivation of the Defendants-Appellees is their moral-religious belief against abortion. A-11. The pre-occupation of the Appellant with

religion is made even more obvious when the Petition for Certiorari is read.

For example, she purports to quote the following passages nowhere reflected in the record. "There has never been such a holocaust perpetrated against motherhood and the most innocent of all God's creations, the unborn child." App. Br. 21. The preface also commends to the facility's volunteers a daily prayer "for the family, motherhood and unborn children." App. Br. 21. It begins, "St. Joseph and Mary, whose protection is so great before the throne of God, please petition our Father in Heaven to protect families, motherhood and their unborn children from abortion . . ." App. Br. 21, 22.

Despite the insincere disclaimer of Appellant that "it is not petitioner's purpose to denigrate any group's form of worship", the hostility against religion is expressed in no uncertain terms. It is thus clear that this case is not about § 1985(3), race, a class of anything, or an injured Plaintiff. It is instead about how someone dislikes religions, hardly a subject for the Supreme Court to review.

Expressed in terms of a class-based discriminatory animus, it is thus the "moral-religious belief against abortion" that allegedly is the motivation of the Defendants. However, as the District Court indicates, "the class does not exist independently of Defendants' actions, nor is there a common characteristic distinguishing the class from the rest of the population." App. Br. A-11. There must be a class-based invidiously discriminatory animus for a § 1985(3) action, but none exists herein.

A case similar to the present one is *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir. 1987), wherein Plaintiffs attempted to form a conspiracy against persons who do not share the anti-abortion beliefs of the conspirators." The similarities between *Roe v. Abortion Abolition Society* and *Lewis v. Pearson, et al.*, however, extend far beyond definition of the same class. Plain-

tiffs in *Roe*, like the Plaintiff herein, claimed deprivation of numerous rights and intention infliction of emotional distress. A religiously motivated conspiracy was claimed to be present in *Roe*, as is claimed in the present case (see previous discussion). Some of the Plaintiffs in *Roe* were individual women, like Plaintiff Warna Lewis herein.

Holding that Section 1985(3) does not permit the allowance of a class-based animus directed at the class of persons who do not share Defendants' religious beliefs about abortions, the District Court in *Roe* dismissed Plaintiffs' claims. *Roe* at 933. The Appellate Court also held that 42 U.S.C. § 1985(3) does not itself provide any substantive rights (*Roe* at 933), did not intend to reach all tortuous conspiracies that interfere with the rights of others even if the rights were derived from the Constitution (*Roe* at 934), and held that no recognizable class was stated (*Roe* at 934). More particularly, the *Roe* Appellate Court held that the Plaintiffs failed to state a claim of discrimination against a class of persons because of their religion. *Roe* at 934. The class must exist independently of the Defendants' actions and not because of any alleged personal malice the conspirators may have toward them.[1]

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[1] See also *Doe v. Keane*, 658 F. Supp. 216, 221, 222 (W.D. Mich. 1987) where Plaintiff unsuccessfully attempted to define a class of "surrogate mothers". She was not a member of a class that existed except by virtue of the alleged discriminatory acts. See also *Wilhelm v. Continental Title Co.*, 72 F.2d 1173 (10th Cir. 1983). *Wilhelm* found that a class of "handicapped persons" was not in the contemplation of Congress in 1871, and therefore should not be included as a class in what is now Section 1985(3). The classes or groups to be protected by this Statute must be derived from statutory construction, and this Statute was enacted for a particular purpose and to meet particular conditions. *Wilhelm* at 1177. Other recent cases denying § 1985(3) application are *Trautvetter v. Quick*, 916 F.2d 1140, 1153 (7th Cir. 1990), *Garrie v. Gray*, 912 F. 2d 808 (5th Cir. 1990), and *McCalden v. California Library Ass'n*, 919 F.2d 538 (9th Cir. 1990).

Thus although the "animus" that the appellant complains of is the "moral-religious belief against abortion" of the Defendants, this fails to qualify as a class-based invidious discrimination animus required by the Courts. Appellant thus fails, in paragraph II page 16 of her Petition to comprehend the order of submitting a constitutional-type issue to a jury. It must first be determined by a court that such a cause of action exists. Then, and only then, may the plaintiff be entitled to submit her claim for consideration by a jury.

V.

A "FUNDAMENTAL RIGHT TO ABORTION" DOES NOT EXIST, BUT WHATEVER RIGHT OR INTEREST THAT DOES EXIST, IF ANY, DOES NOT EXIST AGAINST PRIATE CONDUCT

It is no secret that the so-called right to an abortion, the intentional taking of a human life, is and has been under heavy attack since the day of its decision.[2] Since *Roe v. Wade*, 410 U.S. 113 (1973), about twenty-two abortion cases have been reviewed by this Court, and many more have been brought but not been granted review or have been dealt with summarily.[3]

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[2] For example, see Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973); and Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 184.

[3] *Abortion and the Constitution*, Appendix One (D. Horan, E. Grant and P. Cunninham eds. 1987).

Roe has been criticized as "read(ing) like a set of hospital rules and regulations, whose validity is good enough this week, but will be destroyed with new statistics."[4]

Roe has been undermined by subsequent changes and development in the law. See, for example, *Thornburgh v. American College of Obstetrician and Gynecologists*, 476 U.S. 747, 783 (1986) where Burger, C.J. in dissent observes "The extent to which the Court has departed from the limitations expressed in Roe is readily apparent." There also has been a significant alteration in the state of abortion law. For example, see *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) where all of the challenged provisions of the Missouri statute were upheld. The willingness to uphold laws to protect life is a dramatic change from this Court's prior pattern of striking down every meaningful regulation of abortion.

In addition the alteration of abortion jurisprudence is evidence in the disappearance of majority support for the trimester scheme set up in Roe. The Honorable Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissent to *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). "I . . . remain of the views I expressed in my dissent in Akron. The state has compelling interest in ensuring maternal health and in protecting potential human life . . . throughout

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[4] A. Cox, *The Role of the Supreme Court in America* 113-14 (1976). See also Bopp and Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U.J. Pub. L. 181 (1989), one of the best discussions of Roe. Also see Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. Contemp. L. 131, 134 (1989). Wardle, *supra*, *Rethinking Roe v. Wade*, 1985 B.U.U. L. Rev. 231; Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L. J. 267, 281 (1986); Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 1985 N.C.L. Rev. 375.

pregnancy". With the Honorable Justices Rehnquist, White, Scalia and Kennedy declaring the same view in *Webster*, five justices have now recognized that a state's interest in protecting unborn human life exists throughout pregnancy.

Also, the *Webster* plurality declared that a woman has at most only a liberty interest in abortion under the Fourteenth Amendment, not a fundamental right to abortion as *Roe* held. *Webster*, 109 S. Ct. 3058. The Honorable Justice Scalia concurs that there is no fundamental right to abortion. *Id.* at 3064-67.

Since at least five members of this Court would appear to agree that, at a minimum, there is no general fundamental right to abortion, the foundation of Plaintiff Lewis claim, the "meat" to the § 1985(3) sandwich, does not exist. The sandwich consists of only bread, and is not a sandwich at all.

That further great changes in *Roe* will happen seems inevitable. Precedents of a court are not sacrosanct, especially in the area of constitutional interpretation unlike the context of legislative interpretation, where Congress remains free to alter what the Court has done. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989). The direction of the court seems to be against creating "constitutional fundamental rights". For example, see *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) where the court concluded that there was no fundamental right to commit homosexual sodomy. It was also claimed that a right to engage in such conduct is deeply rooted in this nation's history. *Bowers* at 2846. Also, in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) the court held there is no fundamental right to visitation of a child because states have historically presumed that a child born within a marriage is the product of that marriage, and rejected visitation claims by adulterous fathers.

Roe v. Wade has created inherent confusion in the law (for example, the trimester concept itself, physician discretion, informed consent, and record keeping) operates contrary to other

laws designed to protect unborn human life (for example, the rights of the unborn in tort law, wrongful death actions, equity, and criminal law), and is inconsistent with the sense of justice and social welfare, especially in light of advanced medical technology since 1973. For a full discussion of these individual points, see Bopp and Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, B.Y.U. Journal of Public Law.

Thus, in light of the aforesaid factors, the notorious assumptions of the Appellant that not only does she have a fundamental right to abortion, but also that right, if it exists, constitutes a basis for § 1985(3), are in error. Furthermore, whatever right or interest exists, if any, exists against *governmental interference*. In the present case, however, Appellant sues as a *private individual* attempting to vindicate *private rights*.

Appellant's Petition, except as discussed by the cases contained in the appendix, seems to skip the issue of state action. A reader is left with the impression that the Appellant feels no need to demonstrate state action, an assumption contrary to law.

The Complaint does assert that the attorney general of Missouri should enforce its Merchandising Practices Law, that the non-enforcement of a statute is the equivalent of state action, and that the Attorney General has stated that the defendants' advertising does not constitute misrepresentation. A-43. Thus the Appellant would apparently presume state action whenever a state has legislation that someone believes is applicable and should be enforced, whether against the law or not.

The leading case on the applicability of § 1985(3) specifically held that when an alleged conspiracy is aimed at a right that is a right against state interference, the Plaintiff must prove that the conspiracy contemplated state involvement. *Scott, supra*, at 833. *Roe v. Wade, supra*, prohibited alleged state legislative interference with abortion. However, the Fourteenth Amendment

protects an individual against state action, not against wrongs done by individuals. *Scott, supra*, at 1056 (quoting Justice Douglas and Justice Fortas). *Scott* distinguished *Griffin* by ruling that if the right sought to be protected is a right against state interference, state involvement must be shown. *Scott*, 463 U.S. at 834.

Even if there is a fundamental right to an abortion, an extremely questionable proposition which this court could specifically deny herein, nevertheless no such right to or interest in an abortion exists in the absence of state action.

Griffin did not dispense with the requirement of state action in every § 1985(3) claim. *Portland Feminist Women's Health Center et al. v. Advocates for Life, et al.*, Civil No. 86-559-FR 9 (C.Ct. Oregon, March 4, 1988) similarly dismissed a 42 U.S.C. Section 1985(3) complaint brought by a feminist Women's Health Center, its directors, employees, and several clients of the Health Center. The named defendants were Advocates for Life, Inc., Christians in Action, and twelve individuals, "all of whom are opposed to abortion."

This case is factually similar to the present case in many respects. A client was one of the plaintiffs, it was claimed that infliction of mental distress was committed, and also like the present case, the sole federal question was a claim under 42 U.S.C. § 1985(3). The court analyzed the issue of whether a class composed of women seeking to terminate their pregnancies by abortion is a protected class under 42 U.S.C. Section 1985(3). In addition, plaintiffs in *Portland* asserted that the defendants conspired to deprive women of their alleged federal constitutional right to choose abortion. This case is also similar to the present case in that the named defendants were Christians and individuals opposed to abortion. Recitations of religion and opposition to abortion saturate the Complaint of this Appellant Lewis. (See previous discussion in paragraph IV of this Brief.)

After discussing both *Griffin* and *Scott*, the *Portland* court held that although the recognition of a constitutional right to privacy has been held to guarantee to women the right to make certain fundamental intimate choices without governmental interference, it does not, however, protect that right from alleged *private* interferences. *Portland, supra.* Since no state action existed, the claim under § 1985(3) was dismissed.

It is requested that the claim compare the allegations of paragraph 16 of the Complaint (A-43), to the definition of state action set forth in *Briscoe v. Bock*, 540 F.2d 392 (8th Cir. 1976). There the Court held that even though the Defendant Hospital received public funds, had tax exempt status, belonged to a health planning agency authorized by federal law, and was subject to state regulation, there was no state action. State action can only exist when there is sufficiently close nexus between the state and the challenged action of the regulated entity, so that the latter may be fairly treated as that of the state itself. *Briscoe, supra*, 392, 395.[5]

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[5] Numerous other pertinent cases on the subject of state action are: *Pariser v. Christian Health Care Systems*, 627 F. Supp. 39 (E.D. Mo. 1984), there is state action only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff complains; *Lamb v. Farmers Insurance Co.*, 477 F. Supp. 126, 127 (1979) and also 611 F.2d 702, 703 (8th Cir. 1979), acknowledging the essential element of state action; *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 730 (D. Wyo. 1986), *Griffin* should only be read in the context of the Thirteenth Amendment — a claim of conspiracy to interfere with rights protected under the Fourteenth Amendment still requires some kind of state action or involvement; *Thomas v. Rohner-Gehrig and Company*, 582 F. Supp. 669, 673 (1984), and *Doe v. Keane*, 658 F. Supp. 216, 221 (W.D. Mich. 1987), any violation of the Fourteenth Amendment sought to be redressed through 42 U.S.C. § 1985(3) must be predicated on state action; *Grossling v. Ford Memorial Hospital*, 614 F. Supp. 1051 (D.C. Tx. 1985), mere approval of or acquiescence in private activity is insufficient to prove state involvement; *Prov. Gov. of Rep. of New Afrika v. Amer. Broadcast*, 609 F. Supp. 104 (D.C.D.C. 1985), 42 U.S.C. Section 1985(3) was passed pursuant to the Thirteenth Amendment, the latter of which standing

(Footnote 5 continued on next page)

Simply stated, state inaction is not action. See *Flagg Brothers, Inc. v. Brooks, et al.*, 436 U.S. 149 (1978).

CONCLUSION

The Petition was filed too late and the Court has no jurisdiction over this matter.

The Appellant would like to re-write 42 U.S.C. Section 1985(3) to include coverage for the individual Plaintiff involved herein. So would every other Plaintiff. However, this Statute was not intended to be a general federal tort law, and instead was passed to protect against racial discrimination.

It is obvious from legislative history, case law both prior and subsequent to *Griffin* and *Scott*, the latter two Supreme court cases themselves, and a fair reading of the statute, that the Appellant has failed to allege a class-based discriminatory animus the statute was intended to protect against.

It is further apparent that the claims "animus" presented in the Complaint and reinforced by the Appellant's Petition is a pro-life motivation designed to save babies, which Appellant labels a "moral-religious belief against abortion." However, this is not equivalent to racial or racially-related hatred required for application of § 1985(3).

Similarly the class attempted to be asserted by the Plaintiff Lewis is not a class protected by the statute.

(Footnote 5 continued)

alone did not provide a direct cause of action to eradicate the vestiges of slavery. *Watkins v. Mercy Medical Center*, 520 F.2d 894, 896 (9th Cir. 1975), and *Ascherman v. Presbyterian Hospital*, 507 F.2d 1103, 1105 (9th Cir. 1974), both of which hold the involvement of the state must be significant.

Most importantly, Plaintiff's theory hinges on the assumption that there remains a constitutional "fundamental right to abortion", a concept which does not presently exist or which is in total retreat for a host of reasons, the most important of which is that the killing of innocent human life is wrong. Current case law would appear to indicate that there is, at most, only a liberty interest, insufficient foundation for a § 1985(3) action. Even if there exists a fundamental right to abortion, it has been theorized as arising from the Fourteenth Amendment. Since this amendment is directed against official conduct, state action must be demonstrated. The allegation of the Petition are absent of state action, and state inaction is not the equivalent of state action.

Respectfully submitted,

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No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

VS.

PEARSON FOUNDATION, INC., et al.,
Respondents.

OPPOSITION OF RESPONDENT RICHARD CHRISMER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by Petitioner, would be presented for review in this case:

1. Whether the Petition for Writ of Certiorari is timely because it was filed more than ninety days following an Order of the Eighth Circuit Court of Appeals denying Petitioner's "Suggestion for Rehearing En Banc" although the Court of Appeals' Order was subsequently corrected to deny Petitioner's "Petition for Rehearing" and the Petition for Writ of Certiorari was filed within ninety days from the date of the corrected Order.

2. Whether the District Court properly dismissed plaintiff's Complaint for failing to state a claim or cause of action upon which relief can be granted under 42 U.S.C. § 1985(3) because *Roe v. Wade*, 410 U.S. 133 (1973), was wrongly decided.

3. Whether the District Court properly dismissed plaintiff's Complaint for failing to state a claim or cause of action upon which relief can be granted under 42 U.S.C. § 1985(3) because the subclass of "women each of whom, like the plaintiff herein, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion" is not the type of class protected by 42 U.S.C. § 1985(3).

4. Whether the District Court properly dismissed plaintiff's Complaint for failing to state a claim or cause of action upon which relief can be granted under 42 U.S.C. § 1985(3) because there are not sufficient allegations of state action required to support a 42 U.S.C. § 1985(3) claim based upon a Fourteenth Amendment right.

LIST OF PARTIES

The list of parties contained in the Petition for Writ of Certiorari is substantially correct. Respondent Richard Chrismer is an individual and hence does not make the listing required by the Court's Rule 29.1 of any parent or subsidiary corporations.

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IV. *Certiorari* is not warranted because the Eighth Circuit's affirmance of the District Court's dismissal of the Complaint is not in conflict with a decision of another United States Court of Appeals or State Court in that the Eighth Circuit's Order would require Petitioner to plead State action as opposed to State inaction for a claim under 42 U.S.C. § 1985(3). 21-24

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No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

vs.

PEARSON FOUNDATION, INC., et al.,
Respondents.

OPPOSITION OF RESPONDENT RICHARD CHRISMER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PERCEIVED MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner's complaint was dismissed by the district court for failure to state a claim upon which relief could be granted. This dismissal was ultimately affirmed by an equally divided en banc decision of the Eighth Circuit Court of Appeals.

Because the complaint was dismissed on its face, the statement of the cause consists solely of the allegations contained in Petitioner's complaint and the procedural history below. The

only material misstatement Respondent perceives at this time is the conclusion drawn by Petitioner in the continuation of the footnote contained on page 3 of her petition regarding the timeliness of her petition for certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY BECAUSE IT WAS FILED MORE THAN 90 DAYS FROM THE DATE THE COURT OF APPEALS INITIALLY DENIED PETITIONER'S REQUEST THAT THE EN BANC COURT REHEAR THE CASE. THE COURT OF APPEALS' SUBSEQUENT TECHNICAL CORRECTION OF ITS ORDER DENYING THE PETITION FOR REHEARING DID NOT TOLL THE TIME FOR FILING A PETITION FOR A WRIT OF CERTIORARI.

On January 15, 1988 the United States District Court for the Eastern District of Missouri entered its order dismissing Petitioner's complaint, without prejudice, for failure to state a claim upon which relief could be granted. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. On July 10, 1990 the Eighth Circuit Court of Appeals, by a 2 to 1 decision, reversed the decision of the District Court. *Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990).

On July 24, 1990 defendants filed their petition for rehearing with suggestion for rehearing en banc. On September 7, 1990 the Eighth Circuit Court of Appeals granted the suggestion for rehearing en banc and vacated the July 10, 1990 panel opinion. *Id.* at 228. Following supplemental briefing and oral argument the judgment of the District Court was affirmed on October 24, 1990 by an equally divided en banc court of appeals. *Lewis v. Pearson Foundation, Inc.*, 917 F.2d 1077 (8th Cir. 1991).

Thereafter Lewis filed a petition for rehearing by the en banc court. By an order dated December 7, 1990 the Court of Appeals stated: "Appellant's suggestion for rehearing en banc has been considered by the court and is denied for reason of the lack of a

majority of the active judges voting to rehear the case en banc. Petition for rehearing by the panel is also denied." (App. 35) By an order dated December 17, 1990, the Court of Appeals amended its order of December 7, 1990, by striking the last full sentence of the order. (App. 34) Finally, on January 10, 1991, the Court of Appeals entered an order which read:

> On the court's own motion, the orders of December 7, 1990, and December 17, 1990, are hereby vacated.
>
> Appellant's petition for rehearing has been considered by the court and is denied. (App. 35)

A petition for certiorari in a civil case must be filed within 90 days of the entry of the judgment below. 28 U.S.C. § 2101(c) (1982). "This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. ___, 110 S. Ct. 1651, 1660 (1990). A petition for rehearing timely presented to the Court of Appeals tolls the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing. *Id.*; Sup. Ct. R. 13.4 (1990). Furthermore, only a proper petition for rehearing authorized by Rule 40(a) of the Federal Rules of Appellate Procedure tolls the period for seeking certiorari; a suggestion for rehearing en banc permitted by Rule 35(b) of the Federal Rules of Appellate Procedure does not toll the period. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1660 n. 13, Sup. Ct. R. 13.4 (1990).

Accordingly, in order for Lewis' petition for writ of certiorari to be considered timely, the pleading she filed on November 6, 1990, both must be a petition for rehearing authorized by Rule 40(a) and the effective date of its denial by the Court of Appeals must have been January 10, 1991, as opposed to the Court of Appeals' earlier orders of December 7 and December 17, 1990.

This Court has recognized that "[t]he Court of Appeals of course cannot make the record what it is not. The time for

applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending the time." *Missouri v. Jenkins*, 110 S. Ct. at 1662. The Court of Appeals' subsequent correction of its December 7 order does not change the impact of that order; the Court of Appeals denied the suggestion for rehearing en banc on December 7, 1990.

In *Missouri v. Jenkins, supra*, the Court of Appeals amended its prior order nunc pro tunc to insure that the final order that was ultimately entered accurately reflected the action taken on the earlier date. *Id.* Likewise, the Court of Appeals' order of January 10, 1991 in this case does not more than amend the record to correctly reflect the action which was taken by the Court of Appeals on December 7, 1990. *F.T.C. v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 211-212 (1952).

Because the petition for writ of certiorari was not filed within 90 days from December 7, 1990, this Court has no jurisdiction to grant the writ and it should be denied.

II.

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT FOR FAILING TO STATE A CLAIM OR CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED UNDER 42 U.S.C. § 1985(3) BECAUSE *ROE V. WADE* WAS WRONGLY DECIDED.

It is not necessary to reference the great amount of litigation and commentary spawned by *Roe v. Wade*, 410 U.S. 113 (1973). The subject of abortion has been highly controversial. There has been a debate whether *Roe* was correctly decided.

Petitioner argued below and assumes in the current Petition: "There is no question but that the abortion rights as originally

derived by the Supreme Court is pinned on the Fourteenth Amendment's guarantee of privacy and liberty." (Appellant's Brief at 22-23).

In *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3077 (1989), Justice Blackmun, dissenting, stated the intendment of the plurality opinion in that matter was "that *Roe* is no longer good law." Justice Scalia, concurring, stated: "... I share Justice Blackmun's view ... that [the decision] effectively would overrule *Roe v. Wade*, (citation omitted). I think it should be done, but would do it more explicitly." *Id.* at 3064.

Respondent also believes *Roe* and its progeny were wrongly decided. *Webster v. Reproductive Health Services, supra*, at 3064-3067 (Scalia, J. concurring); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 786-797 (1986) (Burger, C.J., O'Connor, J., Rehnquist, J., and White, J., dissenting); *Doe v. Bolten*, 410 U.S. 179, 221-223 (1973) (White, J. and Rehnquist, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 171-178 (1973) (Rehnquist, J., dissenting).

Petitioner will no doubt concede that if there is no "right to an abortion" then Petitioner has no claim under 42 U.S.C. § 1985(3). Thus, a fundamental issue is the viability of such a "right" in light of *Webster v. Reproductive Health Services, supra.*

III.

CERTIORARI IS NOT WARRANTED BASED UPON PETITIONER'S ARGUMENT THAT WOMEN SEEKING ABORTIONS ARE A PROTECTED CLASS UNDER 42 U.S.C. § 1985(3) BECAUSE (A) IN ORDER TO CONSTITUTE A PROTECTED CLASS THE MEMBERS MUST SHARE EITHER INHERITED OR IMMUTABLE CHARACTERISTICS OR THE ALLEGED CLASS-BASED DISCRIMINATION MUST RESULT FROM THE CLASS MEMBERS' POLITICAL BELIEFS OR ASSOCIATIONS, AND FURTHER, *CERTIORARI* IS NOT WARRANTED BASED UPON PETITIONERS ARGUMENT THAT WOMEN SEEKING ABORTIONS ARE A PROTECTED CLASS UNDER 42 U.S.C. § 1985(3) BECAUSE THE LEGISLATIVE HISTORY OF THAT STATUTE CLEARLY SHOWS THAT CONGRESS DID NOT INTEND TO PROTECT GENDER BASED DISCRIMINATORY ANIMUS.

A.

A conspiracy is within the scope of 42 U.S.C. § 1985(3) only if it is motivated by some class-based, invidiously discriminatory intent.

> The language [of § 1985(3)] requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (emphasis in original; footnotes omitted). Lewis' complaint fails to allege a conspiracy motivated by *class-based* invidiously discriminatory

intent. Accordingly, the district court did not err in dismissing Lewis' complaint for failure to state a claim upon which relief can be granted.

Lewis alleges in her complaint that the defendants have engaged in a conspiracy "to prevent as many women as possible from obtaining abortions." (App. 42, Complaint ¶ 14). Lewis' allegation concerning the purported § 1985(3) protected class is as follows:

> The conspiracy is therefore motivated by an invidiously discriminatory animus toward a class of women each of whom, like the plaintiff herein, has made the decision in answer to an unwanted pregnancy to terminate the pregnancy by a lawful abortion.

Section 1985(3) does not provide a cause of action for every alleged conspiracy to deprive a person or persons of constitutionally protected rights, rather, it is intended to protect only against those conspiracies which are the result of class-based animus. Not every "class", however, gives rise to protection under § 1985(3).

The Sixth Circuit Court of Appeals has succinctly stated the type of classes which are within the protection of the statute.

> We hold that the class of individuals protected by the "equal protection of the laws" language of the statute are those so-called "discreet and insular" minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics. The persons protected under the "equal privileges and immunities" language of the statute are those individuals who joined together as a class for the purpose of asserting certain fundamental rights.

Browder v. Tipton, 630 F.2d 1149, 1150 (6th Cir. 1980).

Accordingly, to successfully allege a class entitled to protection under § 1985(3) Lewis must be able to plead "membership in some group with inherited or immutable characteristics (e.g., race, gender, religion or national origin), or that the discrimination resulted from the plaintiff's political beliefs or associations," *Galloway v. Louisiana*, 817 F.2d 1154, 1159 (5th Cir. 1987). Additionally, Lewis must show that the defendants' alleged wrongful conduct is a result of Lewis' class membership. By blurring together the equal protection and privileges and immunities language in the statute, Lewis has attempted to manufacture a protected class where none exists. By examining the distinction between an equal protection and an equal privileges and immunities class, it is apparent that Lewis has failed to allege a class protected by § 1985(3).

1. EQUAL PROTECTION CLASS

The class of individuals intended to be protected by the "equal protection of the laws" language of § 1985(3) are "those so-called 'discreet and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics." *Browder*, 630 F.2d at 1150. Although originally intended to protect against racial discrimination, some Courts of Appeals have extended protection under § 1985(3) to conspiracies that discriminate against persons based on gender. *See Galloway*, 817 F.2d at 1159.[1] However, the alleged conspiracy in Lewis' complaint is not driven by gender-based animus. The decision to seek an abortion triggers the alleged conspiracy, not the incidental fact that women are the only group who can become pregnant and therefore consider seeking an abortion.

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[1] Respondent indeed argues in the text *infra* that the legislative history of the Ku Klux Klan shows the intent only to protect Blacks and their supporters.

In *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), the court held that a complaint that alleged (a class of women who seek abortions and are deprived of that care by the defendant's action) failed to state a cause of action under § 1985(3). In rejecting the plaintiff's argument that such a class was protected by the statute, the court reasoned as follows:

> The Court disagrees with the proposition that any "particular [sub]class of women" is a protected class.[4] For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based because it separates persons of the same gender from each other and, obviously, on a basis other than by gender. The inquiry, thus, must be made without respect to gender, i.e., it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the § 1985(3) analysis.
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>
> [4] If this principal were carried to its logical conclusion, the following illogical result would obtain: Because women are a protected class, any subclass of women is also a protected class. Because men are not a protected class any subclass of men is also an unprotected class. Therefore, e.g., a class of homosexual women would be protected, but a class of homosexual men would not be.

National Abortion Federation, 721 F. Supp. at 1171.

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[2] Several Courts of Appeals have found women seeking abortions to be a class entitled to protection under § 1985(3). *See New York State National Organization For Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *Roe v. Operation Rescue*, 710 F. Supp. 577, 581 (E.D. Pa. 1989), *aff'd* 919 F.2d 857 (3d Cir. 1990); and *National Organization For Women v. Operation*

(Footnote 2 continued next page)

The conspiracy alleged by Lewis is not motivated by any gender-based animus, but is a result of the "abortion-seeking" trait of individual women. Lewis' complaint fails to allege any class-based animus under the equal protection prong of § 1985(3).[2]

In analogous circumstances to the case at bar, patients, doctors providing abortions, an abortion clinic and staff, and an organization providing escort services to the abortion clinic were found not to be classes protected by § 1985(3). *Roe v. Abortion Abolition Society*, 811 F.2d 931, 935 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987). The reasoning of *Roe* is equally persuasive in the present case:

> The Plaintiffs argue that the class in this case consist of those people who do not agree with the Society defendants' point of view. The class test is turned on its head, however, if a class is defined as all those who are not of the same class as the conspirators, for example, all those who do not believe in a specific religious faith or political party — or all those who do not have a religiously based opposition to abortion. Logic may define as two separate classes "we" — all those who share a certain belief — and "they" — all those who do not hold that tenet —, but § 1985(3) is aimed at an animus against those who have the despised trait. In this case, the Plaintiffs do not limit the defendant class to

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(Footnote 2 continued)

Rescue, 726 F. Supp. 1483, 1492 (E.D. Va. 1989), *aff'd* 914 F.2d 582 (4th Cir. 1990), *cert. granted*, ___ U.S. ___, 111 S. Ct. 1070, 112 L.Ed.2d 1176 (1991). Each of these cases share the same flaw recognized by the court in *National Abortion Federation* —where an alleged class based animus is directed at a subset of women and not women as a class, the animus must be based upon something other than gender. Accordingly, a subclass of "women seeking abortions" is not subject to gender-based discrimination and therefore does not constitute a protected class under the equal protection prong of § 1985(3).

> persons who are members of a particular religious denomination but describe them only by their adherence to a specific belief that transcends denominational religious lines. Correspondingly, the Plaintiffs define themselves only as "persons who do not share defendants' religious beliefs about abortion," which is no more a common trait or characteristic than would be a belief in using seat belts or in an ever-expanding universe.

The District Court below seized upon the language in *Roe*, and compared the opinion to the language of the present Complaint. The first paragraph of the Complaint specifically alleges defendants' opposition to abortion as a result of a "moral-religious standard for all of society as well as themselves...." (Appendix, p. 36, Complaint, ¶ 1.)

2. EQUAL PRIVILEGES AND IMMUNITIES

The second aspect of § 1985(3) protects "those individuals who joined together as a class for the purpose of asserting certain fundamental rights." *Browder*, 630 F.2d at 1150. This prong of § 1985(3) has received limited class-based animus on the basis of the members' political views. *Galloway*, 817 F.2d at 1159; *see Perez v. Cucci*, 725 F. Supp. 209, 248-50 (D.N.J. 1989), *affirmed without opinion*, 898 F.2d 142 (3d Cir. 1990) (cataloging cases where the courts have either granted or denied § 1985(3) protection to politically based classes).

The mere fact that Lewis has alleged that defendants have conspired to deprive her of a fundamental right does not place her in a protected class. Lewis has alleged no "joining" or "associating" of herself with a group committed to advancing the fundamental rights which she alleges is the basis of the conspiracy.

While such a group does not necessarily have to be a formal political organization, the group must have some form:

> There need not necessarily be an organization structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath to fealty, it need not be an initiation right; but at least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group.

Means v. Wilson, 522 F.2d 833, 839-40 (8th Cir. 1975) (quoting *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 215 (5th Cir. 1975)). Apart from Lewis' abortion-seeking conduct, she has alleged no association with any group which would support the class-based animus requirement of § 1985(3).

Lewis' allegation that defendants conspired to deprive her of a fundamental right is insufficient to place her in a protected class. "If defendants tried at random to deprive anyone of exercising [a fundamental] right, their motive for the deprivation would touch all equally, without discrimination." *Browder*, 630 F.2d at 1153. Lewis' complaint is therefore insufficient under the second prong — equal privileges and immunities — of § 1985(3).

Because § 1985(3) requires intent to deprive a person of equal protection or equal privileges and immunities, there must be some racial or otherwise class-based invidiously discriminatory animus behind the alleged conspirators' actions. Lewis must show membership either in some group with inherited or immutable characteristics or that the alleged discrimination resulted from her political beliefs or associations, *and* that the alleged conspiracy was sparked by her membership in the class. Lewis has neither alleged a conspiracy triggered by her membership in an immutable class (women) nor has she alleged that she is a member of any other politically-based class against which the alleged conspiracy was directed. Lewis has alleged nothing more than a non-class-based attempt by defendants to dissuade

women from obtaining a voluntary abortion. Lewis' complaint fails to allege a class-based animus sufficient to state a cause of action under § 1985(3). The petition for writ of certiorari should be denied.

B.

As construed in *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971), a claim under § 1985(3) must allege and prove: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) injury to his person or property as a result of the deprivation. The discrimination must be motivated by some "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.[3]

Assuming, *arguendo*, the question whether women or women seeking an abortion is a gender protected class under § 1985(3), the issue must be faced in light of the legislative history and

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[3] *Griffin v. Breckenridge*, 403 U.S. 88 (1971) involved racial based animus and the right to interstate travel. The Court refrained from deciding whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under § 1985(3). *Id.* at 101 n. 9. Petitioner concedes the current matter does not involve the right to interstate travel. (Petition for Writ of Certiorari at 14 n. 1). This distinguishes the case at bar from *Griffin v. Breckenridge, supra*, and *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989), *aff'd* 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). As the right to interstate travel is not triggered in the present action, Petitioner must plead and prove State action as more specifically argued in the text *infra*. *See generally, United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830-833 (1983), *rehearing denied*, 463 U.S. 825 (1983), *on remand*, 715 F.2d 161 (5th Cir. 1983).

background of the statute. A careful review of the statute's history would indicate that the district court properly dismissed the present Complaint and that the Eighth Circuit's affirmance of the dismissal is not in conflict with decisions of this Court.

In *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 385 (1979), Justice Stevens, in a concurring opinion, stated:

> Private discrimination on the basis of sex is not prohibited by the Constitution. The right to be free of sex discrimination by other private parties is a statutory right that was created almost a century after § 1985(3) was enacted. Because I do not believe that statute was intended to provide a remedy for the violation of statutory rights — let alone rights created by statutes which had not yet been enacted — I agree with the Court's conclusion that it does not provide Respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex.

More recently, in *United Brotherhood of Carpenters and Joiners of America Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983), the Court determined that an alleged conspiracy to infringe on the fourteenth amendment rights of employers who refuse to join a union did not violate § 1985(3) since it was not proved that the State was involved in the conspiracy or that the aim of the conspiracy was to influence the activity of the State. Further, the Court found there was no racial or otherwise class-based invidiously discriminatory animus behind the conspirators' action. The Court held that § 1985(3) could not be construed to reach conspiracies motivated by economic or commercial animus.

Justice White, in speaking for the majority, reviewed a portion of the legislative history of the so-called Ku Klux Klan Act and stated:

> In the first place, it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro. Although we have examined with some care the legislative history that has been marshalled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies, we find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or to do other injury to a competing group by use of otherwise unlawful means. . . . 463 U.S. at 836.

The need to examine the civil rights statutes in view of their historical origins was emphasized in *Shaare Teflila Congregation v. Cobb*, 481 U.S. 615, 618 (1987). There, the question was viewed not as whether Jews were considered to be a separate race by "today's standards," but whether at the time the statute was enacted and adopted Jews constituted a group of people that Congress intended to protect under 42 U.S.C. § 1982. *Id. See also, St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

Despite the plethora of litigation on the issue of whether women seeking abortions are a protected class under § 1985(3), the fundamental question remains whether women, women seeking abortions, or other gender based groups are within the class of people Congress intended to protect at the time the

statute was enacted.[4] Historically, the "right to an abortion" was first recognized some one hundred years after the enactment of the Ku Klux Klan Act in *Roe v. Wade*, 410 U.S. 113 (1973). If the correct class is women seeking abortions, no decision or commentator has suggested that the legislative history of the Ku Klux Klan Act specifically spoke to protection of that particular class.

Other courts, taking a historical view of § 1985(3), have determined that the section does not apply beyond Blacks and their civil rights supporters. *Wilhelm v. Continental Title Company*, 720 F.2d 1173, 1176-1178 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155, 160 (4th Cir. 1985).[5] These courts have limited the classes or class which § 1985(3) protected due to the legislative history of the Act and to prevent the evolution of a general federal common law of torts arising from § 1985(3) cases. *See, e.g., Brown v. Reardon*, 770 F.2d 896, 907 (10th Cir. 1985).

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[4] A listing of the litigation involving § 1985(3) claims and anti-abortion protesters is contained in the Petition for Writ of Certiorari, p. 13-14, n. 4, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (United States Supreme Court October Term, 1990).

[5] *See also, Gibson v. United States*, 781 F.2d 1334, 1341 (9th Cir. 1985), *cert. denied*, 479 U.S. 1054 (1986); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (finding a discharged county employee protected but noting that *Scott* "raises doubts about the legitimacy of plaintiff's claims"; the panel decided the case on a technical issue that one panel of the Sixth Circuit could not overrule the decision of a prior panel unless inconsistent with the decision of the United States Supreme Court); *Bois v. Marsh*, 801 F.2d 462, 476, 255 U.S.App. D.C. 248 (D.C. Cir. 1986); *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1486-1487 (7th Cir. 1985) (finding that a handicapped individual is not a member of a protected class in light of the Congressional purpose underlying § 1985(3); noting that the Ku Klux Klux Act was to protect against racially broad-based animus by the Ku Klux Klan and white supremacists).

The Seventh Circuit has recently stated in *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985):

> We agree with the Fourth Circuit's observation in *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985), that *Scott* calls for a reconsideration of the status of purely political conspiracies under § 1985(3), as the later decision is a powerful indication, that when squarely confronted with the question, the Court would not include such conspiracies within the scope of the provision. As the obligation of the subordinate jurisdiction is to divide the direction of the Court, the considered dictum in *Scott* cannot be ignored. The question of the classes protected under the provision is one of statutory construction. As construed in *Griffin* and *Scott*, § 1985(3) was enacted to fulfill a highly specific purpose and to meet the unusual condition in the Reconstruction Era. Since its decision in *Griffin*, the Court has not expressly provided a remedy to a group or class other than Blacks. The import of both *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against Negroes and their supporters.[6]

Similarly, in *McCord v. Bailey*, 636 F.2d 606, 204 U.S.App. D.C. 334 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 719 (1981), the District of Columbia Circuit performed a comprehensive and scholarly analysis of § 1985(2). The Court noted the statute had its roots in the racial violence that erupted in the South at the end of the Civil War. The Ku Klux Klan had been organized in 1866.

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[6] *But Cf., Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) (stating that § 1985(3) applies to sex discrimination) and *Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988) (stating there is an open question if more than racial conspiracies are encompassed within § 1985(3)).

The subsequent five years had been marked by an increasing number of attacks, often fatal, against Black and Union sympathizers including many federal officials. By 1871, the turbulence in the South had caused considerable consternation in Congress. On March 23, 1871, President Grant asked for legislation giving him additional authority to control the apparent chaos. Throughout the deliberations that followed in the House and Senate, a recurring theme was that of the need to preserve orderly government and to prevent the spirit of insurrection running rife in the South. *Id.* 614-615. This review of the legislative history was cited with approval in *Kush v. Rutledge*, 460 U.S. 719, 717 n. 10 (1983).

Perhaps the most cogent and exhaustive review of the legislative history of the Ku Klux Klan Act is contained in Comment, *A Construction of § 1985(C) in Light of its Original Purpose*, 46 U.Chi.L.Rev. 402 (1979). The author recounts the violent activities of the Ku Klux Klan and similar organizations that caused great alarm among the members of the Forty-Second Congress. The Republicans especially found Klan violence troubling because they were convinced it was politically motivated. Such was the conclusion stated in the majority report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States: "It is clearly established . . . [t]hat the Ku-Klux organization does exist, has a political purpose, is composed of members of the Democratic or Conservative Party, [and] has sought to carry out its purpose by murders, whippings, intimidations, and violence." *Id.* at 408. The immediate goal of the Klan as seen by the Republican majority, was to wrest control of the State governments from the Republican Party and to re-establish Democratic hegemony in the South. The ultimate goal of the Klan's usurpation of power through terror and political subversion, the Republicans believed, was to overthrow reconstruction policy including the recent amendments to the Constitution, thereby withdrawing from the freed men the equal

protection of the laws and equal privileges and immunities that policy secured.

One recent decision has rejected gender based discrimination for Caucasian males as not within the class Congress intended to protect under § 1985(3). *Moore v. City and County of Denver, Colorado*, 744 F. Supp. 1028, 1031 (D. Colo. 1990).[7]

Respondent's arguments make clear that Plaintiff is not a proper member of any class which would avail itself of the protection of § 1985(3).

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[7] Several other recent cases have discussed the groups or classes which § 1985(3) was intended to protect. *McCalden v. California Library Association*, 919 F.2d 538, 546 (9th Cir. 1990) (Holocaust Revisionist not "singled out for federal protection"); *Garrie v. Gray, Inc.*, 912 F.2d 808, 813 (5th Cir. 1990) ("whistle blowers" are not a protected class); *Averitt v. Cloon*, 796 F.2d 195, 198 (6th Cir. 1986) (class of individuals with prior criminal convictions not a protected class); *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114, 128-129 (6th Cir. 1985) (class of dissident union members not protected); *Brown v. Reardon*, 770 F.2d 896 (10th Cir. 1985) (political affiliation not a protected class).

There is indeed some support in other Circuits for the proposition that the victims of a non-racial political conspiracy may recover under § 1985(3). *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985) (collecting cases and noting, however, several were decided prior to *Scott*). Some courts have found gender-based classes to meet the requirements of § 1985(3) after *Scott*. *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1492-1493 (E.D. Va. 1989) (collecting cases), *aff'd* 914 F.2d 582 (4th Cir. 1990), *cert. granted*, 111 S. Ct. 1070 (1991). *See also*, text, *supra*, in Section I.

IV.

CERTIORARI IS NOT WARRANTED BECAUSE THE EIGHTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS OR STATE COURT IN THAT THE EIGHTH CIRCUIT'S ORDER WOULD REQUIRE PETITION TO PLEAD STATE ACTION AS OPPOSED TO STATE INACTION FOR A CLAIM UNDER 42 U.S.C. § 1985(3).

Petitioner asserts the "right to an abortion" on the Fourteenth Amendment's guarantee of privacy and liberty. *Roe v. Wade, supra.* An alleged conspiracy to infringe upon rights guaranteed by the Fourteenth Amendment must prove the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Scott, supra*, at 830-832. The due process clause of the Fourteenth Amendment protects individuals only against governmental interference and not against intrusions by private entities. *Id.* at 831-832 and cases cited therein.

Petitioner alleges that the conspiracy was a "private conspiracy." (Appendix, p. 37, Complaint, ¶ 2.) Private conspiracies without State action are insufficient to support a claim under § 1985(3). *See, e.g., Grimes v. Smith*, 776 F.2d 1359, 1367 n. 16 (7th Cir. 1985). Indeed, the necessity for State Action in a 1985(3) claim formed the basis for the dissent below which found no State action based upon the allegations of the Complaint. *Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318, 326-328 (8th Cir. 1990). (Floyd R. Gibson, S.J., dissenting.)

Petitioner claims State action by the "refusal of the Missouri Attorney General, upon the complaints and reports that have been made to him about the methods of the fake abortion clinics

in general and A-A-A in particular, to invoke the broad statutory and common law remedies at his disposal . . . and further encouraged the defendants' conspiracy by his public pronouncement that the defendants' advertising does not, in his opinion, constitute misrepresentation." (Appendix, p. 43, Complaint, ¶ 16.) Petitioner does not allege in the Complaint that the Missouri Attorney General's interpretation of Missouri law was erroneous or that he authorized the acts of Respondents. State inaction cannot constitute State action for purposes of § 1985(3).

The notion that State inaction constitutes State action was specifically rejected in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164 (1978). In *Flagg Brothers*, the Court upheld the constitutionality of the New York Warehousemen's lien. In so holding, the Court noted that if mere denial of relief was considered sufficient encouragement to make the State responsible for private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner. *See also, Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (stating that the inquiry must be whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State"); Wright, *State Action and State Responsibility*, XXIII Suffolk U. L. Rev. 685, 706-708 (1989); Comment, *State Inaction and § 1985(3): United Brotherhood of Carpenters and Joiners of America v. Scott*, 71 Iowa L. Rev. 1271 (1986).

Arguably, all private action involves interaction with the government and the implicit sanctions resulting from the alleged continued lack of enforcement of constitutionally protected rights would bring most private actor violations within the scope of the Fourteenth Amendment. Thus, under Petitioner's argument, State action could be found in almost any private activity. This is not the mandate of *Flagg Brothers*.

In *Doe v. Keane*, 658 F. Supp. 216 (W.D. Mich. 1987), the Plaintiff contended that there was sufficient State action because of the refusal or failure of the State of Michigan to prohibit surrogate parenting transactions. The Court rejected the argument: "Where the initiative comes from a private actor and not from the state, [it] cannot make a private act a state act for purposes of the Fourteenth Amendment." *Citing, Jackson v. Metropolitan Edison Co., supra.* 658 F. Supp. at 220-221.

In *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) the § 1985(3) claimants contended there was sufficient evidence of State involvement on the part of anti-abortion protesters. The evidence of State involvement put forth by the Plaintiffs included the fact that one of the protesters was a police patrolman who may have exercised apparent authority on behalf of the police department. Moreover, Plaintiffs complained that the police department did nothing to discourage the public perception that it supported the protesters.

In reviewing a conflicting record on the State involvement, the court stated:

> In deciding whether there has been State action necessary to support a claim under 1983, we have required that the State official *affirmatively act* in support of the violation. Thus, "a person acts under color of State law *only when exercising* power 'possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law.' " (Citations omitted.) Put another way, for State action the activity must amount to "police intervention and aid" of the private group. (Citation omitted.)
>
> . . . As the District Court noted in today's case, "[a] State's mere acquiescence in private action does not convert that action into that of the State." *See, Flagg Brothers,*

436 U.S. at 164, 98 S. Ct. at 1737 ("[A] State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.") Because the MWMC has shown neither that women have been deprived of the right to have an abortion nor that anyone was acting under color of State law, it is unlikely that it will prevail on the merits. 866 F.2d at 792-93.[8]

Indeed, it has even been suggested by some commentators that "very strong encouragement" by State officials might not result in State action where the challenged activities of private persons were themselves worthy of some constitutional deference as the importance of associational rights would seem to require that no State action be found unless the acts were solely the products of official encouragement. Rotunda, Nowak and Young, *Constitutional Law: Substance and Procedure*, § 16.03, p. 173 (1986).

The present action is unlike *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). *Bray* involved allegations of interstate travel which the present Petitioner concedes are not involved in the current Complaint. (Petition for Writ of Certiorari at 14 n. 1.) Claims under § 1985(3) that involve the right of interstate travel, rather than a right emanating from the Fourteenth Amendment due process clause, may not require State action. *Griffin v. Breckenridge, supra*, at 106-107.

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[8] Assuming that the Attorney General's failure to act was an authorization to defendants, which the complaint does not specifically allege, Professor Tribe indicates that such "authorization" is insufficient to create State action. He comments that when the State "merely authorizes" a given private action — "imagine a green light at a street corner" authorizing pedestrians to cross traffic — that action cannot automatically become one taken under State authority in any sense that makes the Constitution applicable. Tribe, *American Constitutional Law*, 1705 (2d ed. 1988)

Thus, the decision of the Eighth Circuit affirming the dismissal of the Complaint by the District Court is not in conflict with a decision of another United States Court of Appeals on the same matter or a State Court of last resort. There is no basis under Rule 10 for seeking review of the dismissal of the Complaint on this issue.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

vs.

PEARSON FOUNDATION, INC., et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS MOTHER AND UNBORN BABY CARE OF ST. LOUIS D/B/A AAA PREGNANCY CENTER, RITA ROBERSON, MARIE BECKER, MARY ELIZABETH KRETSCHMER, SUSAN SCHLESINGER AND THOMAS ROHAN

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by petitioner, would be presented for review in this case:

I. Whether this Court is without jurisdiction to review petitioner's Petition for Writ of Certiorari in that this Petition has not been filed within the period allowed by law?

II. Whether the District Court erred in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any state action in the alleged conspiracy in order to properly plead a cause of action under 42 U.S.C. Section 1985(3) where, as in this case, the right allegedly violated is a right protected only against governmental interference rather than private interference?

III. Whether the District Court erred in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any racial or other class-based invidiously discriminatory animus behind the alleged conspiratorial actions of defendants thus failing to allege a claim protected by 42 U.S.C. Section 1985(3) and therefore the District Court did not have subject matter jurisdiction?

IV. Whether the District Court erred in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because the abortion right from which plaintiff bases her complaint exists solely by reason of *Roe v. Wade*, 410 U.S. 133 (1973), which was wrongly decided, and thus plaintiff was not, or cannot be, denied equal privileges and immunities of the laws under 42 U.S.C. Section 1985(3), and therefore the District Court did not have subject matter jurisdiction?

LIST OF PARTIES

Respondents hereto are individuals with the exception of Mother and Unborn Baby Care of St. Louis which did business as AAA Pregnancy Problem Center. In compliance with Supreme Court Rule 29.1, there are no parent companies or subsidiaries of said corporation.

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No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,

Petitioner,

VS.

PEARSON FOUNDATION, INC., et al.,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS MOTHER AND UNBORN BABY CARE OF ST. LOUIS D/B/A AAA PREGNANCY CENTER, RITA ROBERSON, MARIE BECKER, MARY ELIZABETH KRETSCHMER, SUSAN SCHLESINGER AND THOMAS ROHAN

PERCEIVED MISSTATEMENTS OF FACT OR LAW

1. Since the United States Court of Appeals for the Eighth Circuit issued its en banc order on October 24, 1990 affirming the judgment of the District Court as recorded at

917 F.2d 1077 and as further reprinted in the Appendix at page A-1 of petitioner's Brief, petitioner's Petition for Writ of Certiorari was not timely filed, not being filed with this Court until April 10, 1991 and therefore should be dismissed. See Reason I.

2. Petitioner alleges, in Reason I for the granting of this Writ, that the issues involved here are "substantially similar" to the issues involved in *Bray v. Alexandria Women's Health Clinic* which is incorrect in that *Bray* involved the underlying fundamental right to travel, which is protected from not only governmental interference but also private interference which is not at issue in this case therefore presenting an entirely different issue for review, specifically being the absence of state interference in this case as mandated by this Court's decision of United *Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825 (1983) and 42 U.S.C. Section 1985(3).

REASONS FOR DENYING THE WRIT

I. This Court is without jurisdiction to review petitioner's Petition for Writ of Certiorari in that this Petition has not been filed within the period allowed by law.

As referenced beginning on page 2 of petitioner's Petition, through a footnote, the United States Court of Appeals for the Eighth Circuit, in its en banc order, filed October 24, 1990, ruled, through an equally divided court, that the judgment of the Honorable Edward L. Filippine, United States District Judge, was affirmed.

Per Supreme Court Rule 13.4, the time for filing a Petition for a Writ of Certiorari runs from the date of judgment or decree sought to be reviewed, which, in this case, would be the above referenced order of October 24, 1990. If, however, a Petition for Rehearing is timely filed with the Eighth Circuit, the Petition for Writ of Certiorari would be delayed and run from the date of the denial of the Petition for Rehearing. Sup. Ct. R. 13.4.

Petitioner filed, on November 6, 1990, "Plaintiff-Appellant's Petition for Rehearing" asking the "five Judges voting for affirmance to reconsider" the Eighth Circuit's en banc order of October 24, 1990. *See* Plaintiff-Appellant's Petition for Rehearing, page 5. On December 7, 1990, Appellant's Suggestions for Rehearing en banc was denied. In accordance with Eighth Circuit Rule 40A(b)(2) said Petition was automatically deemed to include a Petition for Rehearing by the panel, which was also denied per order of December 7, 1990. *See* Petitioner's Petition page A-33.

Per request of petitioner, the court amended its order of December 7, 1990, by striking the last full sentence of said order, through order dated December 17, 1990. *See* petitioner's Petition page A-34. Petitioner, still not being satisfied with the form

of the order, again sought a modification of said order by letter to the Eighth Circuit Clerk which resulted in the Eighth Circuit's order of January 10, 1991, vacating the previous orders and denying appellant's Petition for Rehearing. *See* petitioner's Petition page A-35.

As referenced by petitioner's correspondence to the Clerk of the Court, dated December 17, 1990, requesting clarification of the court's orders, clearly, petitioner's request for said clarification was to delay the ninety (90) day period for the filing of petitioner's Writ of Certiorari to this court. *See* appendix page A-1 to this brief.

As further referenced by petitioner's correspondence, specifically the last paragraph, it was clear from the en banc order of December 7, 1990, by the Eighth Circuit, that it was the court's intention to deny petitioner's request, and accordingly, the ninety (90) day period for the filing of the Writ of Certiorari to this Court must have commenced on that date and hence the time for filing this Writ to this Court expired on March 7, 1990.

As so held by this Court in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 211 (1952), "we cannot hold that the time for filing a Petition for Certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had *no effect on the merits* of the decision that we are now asked to review in the Petition for Certiorari . . . Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Id.* at 211 (emphasis added).

Although technical modifications were made through various subsequent orders by the United States Court of Appeals, clearly said modifications had no effect on the merits of the decision which is before this Court and petitioner's filing of her Writ of Certiorari to this Court is time barred and therefore should be dismissed for wanting of jurisdiction.

II. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any state action in the alleged conspiracy in order to properly plead a cause of action under 42 U.S.C. Section 1985(3) where, as in this case, the right allegedly violated is a right protected only against governmental interference rather than private interference.

As so held by this Court in *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825 (1983) (hereinafter referred to as *"Scott"*), state involvement is necessary to properly plead a cause of action under Section 1985(3) where the right allegedly violated is a right which is protected from governmental interference only rather than private interference. *Scott*, 463 U.S. at 833.

Plaintiff's cause of action was brought under 42 U.S.C. Section 1985(3) which reads, in pertinent part:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engage therein do or cause to be done, any act in furtherance of the object of said conspiracy, whereby another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or so deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. Section 1985(3) (1980).

In *Scott*, this Court held that Section 1985(3) provides no substantive rights in and of itself to the class allegedly conspired against but that the rights, privileges, and immunities being claimed under Section 1985(3) must be found elsewhere. *Scott*, 463 U.S. at 833. In *Scott*, plaintiffs asserted that defendants had conspired to deprive plaintiffs of their first amendment rights. This court held that because the first amendment only restrains official conduct, in order to properly plead a Section 1985(3) cause of action, it was necessary for plaintiffs to prove that the state was somehow involved in or affected by the conspiracy. Failure to do so would be fatal to plaintiffs' cause of action under Section 1985(3). *Id.*

In this case, plaintiff asserts her right to privacy, or right to an abortion, as recognized by *Roe v. Wade*, 410 U.S. 113 (1983), has been denied. The privacy right announced in *Roe v. Wade* is based upon the due process clause of the fourteenth amendment. *Roe v. Wade*, 410 U.S. at 153. The due process clause only protects individuals against governmental or official interference and not against private interference.

Bound by the decision in *Scott*, a showing of state interference or state action is required in order for plaintiff Lewis to properly plead and maintain a cause of action based upon Section 1985(3) on an underlying claim of right which is based upon the due process claim which protects only against state interference. Since plaintiff's right is found only through the due process clause, *Scott* requires state interference or state action which is not found here. Lastly, plaintiff's attempt to plead state action by alleging the Missouri Attorney General was involved in the conspiracy by depriving plaintiff of the "even-handed enforcement of the Missouri consumer protection laws and other legal protections prohibiting or remedying deceptive advertising practices" will not fulfill the requirement of state action under Section 1985(3). *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

Petitioner's complaint was properly dismissed for failure to state a cause of action upon which relief can be granted because petitioner's complaint failed to allege any state interference as mandated by Section 1985(3).

III. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any racial or other class-based invidiously discriminatory animus behind the alleged conspiratorial actions of defendants thus failing to allege a claim protected by 42 U.S.C. Section 1985(3) and therefore the District Court did not have subject matter jurisdiction.

In order to fulfill the requirements of Section 1985(3) a class-based discriminatory animus must be pled by plaintiff. As held in *Scott*, the congressional purpose of Section 1985(3) was not to provide a general federal tort law for all citizens in the United States. *Scott*, 463 U.S. at 834. The original purpose of Section 1985(3) was to protect Blacks and Republicans from the Ku Klux Klan during the Reconstruction Era. This Court rejected the argument in *Scott* that workers who refused to join a union were a class of individuals intended to be protected by Section 1985(3). *Id.* at 837-39. This Court in *Scott* specifically held that Section 1985(3) will not extend to economic commercial animus. In fact, this Court expressed reservation as to whether Section 1985(3) was ever intended to "reach any class-based animus other than animus against Negroes and those who champion their cause, most notably Republicans." *Id.* at 836.

This Court has stated within *Scott*, 436 U.S. at 834, and also in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that Congress in no way intended to create a general federal tort law through the adoption of Section 1985(3). Congress clearly recognized that

it lacked the authority to punish every "assault and battery" which was committed by two individuals within a state and, in fact, it was this belief that was the general opposition to the original bill. *See Griffin*, 403 U.S. at 101-102; *Scott*, 463 U.S. at 834; Cong. Globe, 42d Cong., 1st Sess., App. 68, 115, 153, 188, 315 (1871).

In *Griffin*, this Court expressed fear that Section 1985(3) might be interpreted as a general tort law and held that prospective plaintiffs under Section 1985(3) must allege an invidiously discriminatory motivation behind the conspirators' actions which must be racial, or *perhaps* otherwise class based. *Griffin*, 403 U.S. at 102. The only class which this Court has recognized to be within the guidelines of Section 1985(3) is racial ("the kind of invidiously discriminatory motivation stressed by sponsors of the limiting amendment.") *Id.* at 102.

Lastly, unlike *Bray*, and as recognized by the District Court in *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493 (1989) (the District Court opinion upon which certiorari was granted in *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991)), the fundamental right of a woman to obtain an abortion, if it exists, only is a right to be free of state interference. *See Scott*, 463 U.S. 825, 833. An important distinction between *Bray* and the instant case is the presence of the right to travel as the underlying right being infringed upon in *Bray* which is protected against not only governmental interference but also private interference as well thus not mandating the presence of state action which would be required here, since, as previously mentioned, *Roe v. Wade* protects individuals only against governmental or official interference and not private interference. Accordingly, petitioner's reliance upon *Bray*, in support of petitioner's urging of this Court's acceptance of its Writ of Certiorari, is misplaced.

IV. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because the abortion right from which plaintiff bases her complaint exists solely by reason of *Roe v. Wade*, 410 U.S. 133 (1973), which was wrongly decided, and thus plaintiff was not, or cannot be, denied equal privileges and immunities of the laws under 42 U.S.C. Section 1985(3), and therefore the District Court did not have subject matter jurisdiction.

As previously stated, Section 1985(3) does not, in and of itself, provide any substantive rights. *Scott*, 463 U.S. at 833. Accordingly, all rights, privileges and immunities that a prospective plaintiff seeks through enforcement of Section 1985(3) must be found elsewhere. In this case, plaintiff bases her alleged "abortion right" on the United States Supreme Court decision of *Roe v. Wade*, 410 U.S. 133 (1973) which held that the "right of privacy", *see Griswold v. Connecticut*, 381 U.S. 479 (1965), included a woman's decision whether or not to terminate her pregnancy.

Respondents herein respectfully submit that *Roe v. Wade* is wrongly decided and that the fourteenth amendment to the Constitution of the United States, whether under a substantive process or a right to privacy analysis, does not encompass the right to an abortion and therefore there can be no deprivation of the equal protection of the laws pursuant to 42 U.S.C. Section 1985(3) as alleged in plaintiff's complaint for failing to state a claim upon which relief can be granted in that the District Court did not have subject matter jurisdiction. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 782 (1986) (Burger, C.J., O'Connor, J., Rehnquist, J., and White, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 222 (1973)

(Rehnquist, J., dissenting); and *Roe v. Wade*, 410 U.S. 113, 171-178 (1973) (Rehnquist, J., dissenting).

If it is determined that plaintiff does not, in fact, have the "right to an abortion" then plaintiff's claim under 42 U.S.C. Section 1985(3) must fail as plaintiff would then be unable to allege a right, privilege or immunity to be protected from the alleged conspiracy of the defendants. *See generally, Scott*, 463 U.S. at 825.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

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December 19, 1990

Office of the Clerk
United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, MO 63101
Attn: Michael Gans

Re: Warna Irene Lewis v. Pearson Foundation, Inc., et al.
No. 88-1293EM

Dear Mr. Gans:

I am the plaintiff-appellant's lawyer in the above-captioned case. I wrote to you on December 10 regarding the court's order of December 7, 1990, made in this case; a copy of the letter is attached for ease of reference.

Today I have received a copy of the court's order of December 17 amending the order of December 7 by striking its last full sentence. Therefore, left standing in the latter order is the part that says,

> Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges to rehear the case en banc.

As pointed out in my letter of December 10, the appellant has filed no suggestion for rehearing. Following the en banc order

of October 24, 1990, she filed a document titled and in substance a *petition for rehearing*. She has thus filed a request under FRAP 40 relating to a petition for rehearing and *not* under FRAP 35 relating to an en banc determination which may be requested by a party's filing of a suggestion. The rule 35 suggestion makes no sense where, as here, the rehearing is requested after the en banc court has already heard the case. The distinction between the two rules in the context of a filing made after an en banc decision is discussed in *Hitchcock v. Wainwright*, 777 F.2d 628 (11th Cir. 1985) (per curiam).

I do not want to seem to be making undue difficulty but the distinction between a petition for rehearing and a suggestion for rehearing en banc is critically important under Sup. Ct. R. 13.4, which tolls the time for the filing of a certiorari petition during the pendency of a petition for rehearing but not during the pendency of a suggestion for rehearing en banc.

Believing that there would be ninety days from the court's ruling on the petition for rehearing to decide whether to seek certiorari, consideration of that step did not start in earnest until receipt of the December 7 order. That decision entails consultation with the plaintiff and the ACLU, the organization sponsoring the suit, at both the local and national levels. It is feared that unless the December 7 order is amended to reflect the denial of the appellant's *petition for rehearing*, there court be great confusion and uncertainty and the generation of an unnecessary issue over when the appellant's ninety-day period for the filing of a certiorari petition began to run.

Assuming that in fact it was the court's intention to deny the request, which I must assume it was, it is therefore asked that the order of December 7, 1990, be further amended so as to clearly

show that it was the appellant's *petition for rehearing* that was denied.

Thank you.

Sincerely,

/s/ Tom Mendelson

c: Counsel of Record